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ABSENTEE.

If a suit be instituted against an absentee who has no known agent in the State, or for the administration of whose property no curator has been appointed, the Judge, before whom the suit is pending, shall appoint a curator ad hoc to defend the absentee in the suit. *Dwight* v. *Bellocq, Noblom & Co.* 209.

An absentee is a person who has resided in the State and has departed, without leaving any one to represent him. It means, also, the person who never was domiciliated in the State, and resides abroad. *Dreville, Widow*, v. *Cucullu*, 695.

A defendant who is domiciled in this State cannot be cited through a curator ad hoc, when he is absent from the State and not represented by an agent. *Ib.*

See PRESCRIPTION.

See MORTGAGE.

ACCOUNT.

A party receiving an account, and making no objection to it within a reasonable time, admits its correctness, and cannot afterwards legally object to it. *Mansell v. Payne*, 124.

See EXECUTORS AND ADMINISTRATORS.

See ACTS PRIVATE AND PUBLIC.

See HUSBAND AND WIFE.

ACTION.

A claimant must establish his claim with legal certainty. It is not enough that he make it probable. *Holtzman* v. *Millaudon*, 29.

If one, against whom there was a cause of action, die, leaving one heir only, the suit shall be carried on against such heir, as it would have been against the deceased. *Bedford* v. *Shelton*, 40.

If the suit had already been brought against the deceased, and he had not answered, it shall not be interrupted, but shall be continued against the heir, by a mere citation or notice served on him to that effect, within the delay for original citations, according as the distance may be from his domicile to the court where the action has been brought. *Ib.*

A married woman cannot sue her husband as long as the marriage continues, except it be to obtain a separation from bed and board, or

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Court, and an answer filed by the curator does not cure the defect. *Ib.*

Where a party brings suit for the use of another, the party bringing the suit has the legal right to control the suit, and if he, of his motion, discontinues or dismisses the suit, the party for whose use the suit was brought is without legal right or authority to prosecute it to judgment for his own benefit. *Moore & Browder* v. *Bres*, 483.

In an action to annul a judgment, it must appear that the party seeking to annul the judgment has conformed to those essential requirements which equity exacts from suitors who invoke its aid. He must have used all reasonable diligence, and not neglected to use such means as he possessed to prevent the evil of which he complains. *Lanfear* v. *Mestier*, 497.

The military order of General Shepley, Military Governor of Louisiana, requiring the Judges of other Courts in the Parish of Orleans to hold the sessions of the Fourth and Fifth District Courts of New Orleans, for the purpose of terminating pending cases, gave such Judges full power to hold those Courts for that purpose. *Ib.*

Courts will judicially take notice, without proof, of whatever ought to be generally known within the limits of their jurisdiction; and this Court cannot ignore an historical fact in relation to the source whence Judges of Courts, over which it exercises appellate jurisdiction, derived their power to preside in other tribunals, at a time when the State laws were merely subsidiary to military rule. *Ib.*

The law grants no action for the payment of what has been won at gaming or by a bet, except for games tending to promote skill in the use of arms, such as the exercise of gun, foot, horse and chariot racing; and, as to such games, the Judge may reject the demand, when the sum appears to him excessive: *Held:*—That the Court a quo cannot, ex officio, declare a bet on a horse race excessive on its face, without any proof indicating the pecuniary standing of the parties to the bet. *St. Ceran* v. *Sherman et als.* 520.

Where it appears by the petition that the defendant is indebted to the plaintiff by reason of a negotiable promissory note, endorsed in blank: *Held:*—That the petition is sufficient and discloses a cause of action; and the averment that the plaintiff is the holder and owner of the note sued on, is not absolutely necessary, as it is a necessary inference from the allegation that the indebtedness of the defendant is on account of the note sued on. *Butler* v. *Stewart*, 554.

Courts will not order the plaintiff in an action to answer interrogatories on facts and articles, when, if confessed or answered in the affirmative, they would establish no defence to the action; or when they

ACTION, *(Continued.)*

look to the establishment of a defence not set up in the pleadings. *Ib.*

Where a defendant, sued on his promissory note, alleges that a third person has, for a valuable consideration, contracted to pay the note and save the defendant harmless: *Held:*—That the Court properly refused to allow the defendant to call such third person in warranty, there being no privity between the plaintiff and the party sought to be called in warranty. *Ib.*

It is not necessary to put the defendant in default before instituting suit against him, if, from the nature of the case, the demand would be of no avail if made. *Rosenthral* v. *Baer*, 573.

The right to make a demand available by exception does not relieve it from prescription in a direct action.

Broussard v. *M. Broussard*, 593.

If a party, having the right to proceed by exception or direct action, selects the latter mode of proceeding, he must submit to the rules governing direct actions, one rule of which is, that actions may be defeated by prescription. *Ib.*

Proceedings were instituted against defendants, who were non-residents or absent from the State; a curator ad hoc was appointed to represent the absent defendants; an exception was filed in the cause, setting up that the defendants had a duly appointed attorney in fact, residing in the State, who was empowered to represent them, and that he should have been cited to defend the action; on the trial of the exception, it appeared in evidence that the attorney in fact had refused to accept the mandate, but afterwards substituted another person to act for defendants: *Held:*—That the exception was not well taken; that the attorney in fact, who had refused to accept the mandate himself, could not substitute another person as attorney under the mandate; that the appointment of the curator ad hoc was regular and correct. *Cestia et al.* v. *Ferrandon et al.* 730.

An action commenced by attachment was instituted against a defendant, and property claimed to belong to the defendant, but to which an absent third person had an apparent legal title, and the third person was made a party to the suit, and his title to the property attached declared simulated. An action of nullity was brought by the absent owner of the attached property: *Held:*—That it would have been legally competent for such third person to contest, by all legal means, the validity of the claim of the plaintiffs to the debt they sought to recover; and if he succeeded in defeating it, his title to the property attached could not be assailed.

Keith v. *Renard & Co. et al.* 734.

That the fact, that a defendant is an absentee, and had no notice of the action brought against him, and no debt was due, are good grounds for an action of nullity and rescission of judgment. *Ib.*

ACTION, *(Continued.)*

That a foreign judgment, which is prescribed on its face, and which does not appear to have been revived by scire facias, or other means provided by the laws of the State where the judgment was obtained, is an extinguished obligation. *Ib.*

APPEAL.

The party who voluntarily executes, either partially or in toto, a judgment rendered for or against him, or who voluntarily acquiesces in or ratifies, either partially or in toto, the execution of that judgment, is not permitted to appeal from it.

Succession of de Egana, 59.

It is inadmissible to say, that the plaintiff could thus partially execute the award, and repudiate those portions of it which were not directly comprehended in the execution. *Ib.*

An account homologated, so far as not opposed necessarily approves and ratifies quoad the creditors who have *not* opposed the tableau. *Ib.*

The principle is well settled, that a party is not permitted to do an act which he is at liberty to abstain from, and, by a mere reservation, screen himself from the legal consequences of that act. Protestatio actui contraria non prodest. *Ib.*

The judgment of the lower Court will be amended, when the record shows that it is not according to the evidence.

Fellows & Mills v. *Bank of New Orleans*, 80.

Where the plaintiff makes out a prima facie case, which is not impugned by the defendant, the judgment of the Court a quo in his favor will not be disturbed. *Fallon* v. *Maury*, 96.

A judge of the lower Court has only authority to enforce the judgments of this Court. He cannot interpret our decision, and enforce different decrees than those rendered by it.

The State on the Relation of Boye et als. 102.

Where the proper parties have not been cited, the case will be remanded. *Ellery et als.* v. *Dameron et als.* 109.

Where a claim is under three hundred dollars, it is not appealable, although it be consolidated with another suit in which another party is plaintiff. *Bazoni* v. *Marcera*, 136.

A non-resident has two years in which to appeal from a decree rendered against him in the Courts. *Lambert* v. *Conrad*, 145.

Where a record is so imperfect as to preclude an examination into the case on its merits, and where no suggestion of diminution of the record is made, and no motion to dismiss the appeal is filed, it will be remanded for a new trial. *City of N. O.* v. *Lacroix*, 146.

All parties interested in maintaining the judgment appealed from, must be brought before the Court in due form by the appellant.

Lallande v. *McRae et als.* 177.

Where the appellant has failed to give bond in favor of all the parties

APPEAL, *(Continued.)*

interested in maintaining the judgment, the appeal must be dismissed. *Ib.*

It is a confounding of terms to call a motion to dismiss an answer to the appeal; and to allow it to be so considered would, in that respect, overturn the rules of pleading. The effect of dismissing an appeal will not, in all cases, be the final confirmation of the judgment appealed from, as the appellant may, under certain circumstances, be permitted to take another appeal.

Johnson v. *Jennison*, 190.

A motion to dismiss an appeal comes too late after three judicial days have expired from the filing of the transcript.

Murison & Co. v. *Buller*, 191.

An appeal taken for an amount less than three hundred dollars, will be dismissed. *Jump* v. *Peltier*, 193.

Where a party goes to trial in the Court below, without a hearing on the exceptions, they are considered as waived, and cannot be heard in this Court. *Cure, Tutrix*, v. *Porté et al.* 206.

Where an institution, like that of slavery, has been abolished since the decision in the lower Court, no judgment can be affirmed; nor can it be reversed. The appeal, ex propio motu, must be dismissed.

Mrs. Henderson v. *Montgomery*, 211.

Damages as for a frivolous appeal are only awarded when the judgment is confirmed. *Ib.*

The appellant, whose duty it was to bring up all the evidence, cannot profit by his own wrong, to have the judgment reversed to the prejudice of the other party. It was the duty of the appellant to suggest, at the proper time, a diminution of the record in the defective transcript. *Succession of Mrs. Clew*, 229.

Where no attention has been called to the bills of exception filed, they will be considered as waived, when the case comes before this Court. *Watterston* v. *Bennett et als.* 250.

When a case has been tried by a jury, a verdict rendered, and judgment given according to that verdict, and the case is not properly a jury case, both the verdict of the jury and the judgment will be set aside, and this Court give a decree according to the facts on record. *Lacroix* v. *Coeler*, 256.

When the transcript contains a true and complete copy or transcript of all the proceedings had, of all the evidence and testimony adduced, and of all the documents filed in the suit; and when such a certificate as this accompanies the record, an assignment of error is not necessary. *Bossier* v. *Carradine, Sheriff et al.* 261.

This Court cannot examine a case on appeal without all the evidence which was adduced below. *Succession of Sheean*, 278.

This Court has repeatedly held that the notification of the filing of a tableau operates as a citation to all persons concerned therein,

APPEAL, *(Continued.)*

creditors, legatees and others. *Succession of Penniston*, 281.

It is a legal requirement, that all parties interested that judgments should remain undisturbed, must be made parties to appeals, or they will be dismissed. *Ib.*

And this Court will notice ex officio, and even without a motion to dismiss, the want of proper parties for a final decree. *Ib.*

The Supreme Court can only exercise its jurisdiction in so far as it shall have knowledge of the matters argued or contested below. *Keller* v. *Judson*, 282.

If, therefore, the copy of the record brought up be not duly certified by the Clerk of the lower Court, as containing all the testimony adduced, the Supreme Court can only judge of such cause on a statement of facts, prepared and signed in the manner directed in the second section of the sixth chapter of the Code of Practice, or on a written exception to the opinion of the Judge, or on a special verdict, and in the absence of all these it shall reject the appeal with costs; but this is to be understood with such modifications as are contained in the following Article: C. P. 896. *Ib.*

The appellant, who does not rely wholly or in part on a statement of facts, an exception to the Judge's opinion, or special verdict, to sustain his appeal, but on an error of law appearing on the face of the record, shall be allowed to allege such error, if, within ten days after the record is brought up, he files in the Supreme Court a written paper, stating specially such errors as he alleges; otherwise, his appeal shall be rejected. *Ib.*

Liability for costs should only be paid when justly incurred. An error on the part of the Court a quo will be corrected. *Mrs. Simpson* v. *Richardson*, 303.

This Court has appellate jurisdiction in criminal matters on questions of law alone, whenever the offence charged is punishable with death, or imprisonment at hard labor, or when a fine exceeding three hundred dollars is actually imposed. (Constitution, Art. 70.) *The State* v. *Ross et al.* 340.

The criminal law has not determined at what age a witness is competent; that competency depends upon his intelligence, reason, judgment, capacity and understanding, which are all matters of facts left to the discretion of the Judge and jury. As to the dying declaration, this Court, in the case of *State* v. *Bennett*, 14 A. 651, has decided that the mental and physical condition of one, whose dying declarations are offered, is a question of fact over which the Supreme Court has no jurisdiction. *Ib.*

A resident of the State must file his petition of appeal within one year from the date of the judgment, or it will be dismissed. *Maupay* v. *City of New Orleans*, 393.

The Act of March 10th, 1866, authorizing suits for the ejectment of

APPEAL, *(Continued.)*

tenants to be tried by preference, cannot operate retrospectively; and, of course, does not apply to appeals filed previous to its passage. *Hoa* v. *Lefranc*, 393.

Whatever relates to the manner of conducting and trying a suit (litis ordinatio) is always within the control of the Legislature, who can, at any time, make any change or modification they may think conducive to the public good and a proper administration of justice in our Courts. *Ib.*

The Supreme Court, except in cases hereafter provided, shall have appellate jurisdiction only; which jurisdiction shall extend to all cases when the matter in dispute shall exceed three hundred dollars; to all cases in which the constitutionality or legality of any tax, toll or impost whatsoever, or of any fine, forfeiture or penalty imposed by a municipal corporation, shall be in contestation; and to all criminal cases on questions of law alone whenever the offence charged is punishable with death or imprisonment at hard labor, or when a fine exceeding three hundred dollars is actually imposed. *State* v. *The Judge of the Fourth Judicial District Court*, 398.

No appeal lies to the Supreme Court where the amount in dispute does not exceed three hundred dollars. The value of property seized by a sheriff to pay taxes, the sale of which was enjoined by plaintiff, cannot give jurisdiction, where the amount of taxes due is less than three hundred dollars. *Ib.*

If the Court shall think it not possible to pronounce definitely on the cause, in the state in which it is, either because the parties have failed to adduce the necessary testimony, or because the inferior Court refused to receive it, or otherwise, it may, according to circumstances, remand the cause to the lower Court, with instructions as to the testimony which it shall receive, to the end that it may decide according to law. *Letten* v. *Spearing et als.* 455.

The word *record* does not mean *copies*, and it is the duty of parties who offer records in evidence, to procure and file copies in the District Court, in due time, if they desire this Court to consider such records as evidence. *Marchand* v. *Coyle*, 482.

A slight misstatement of the name of a Corporation, in taking an appeal from a judgment in its favor, if the alteration or misstatement is not of such a character as to mislead, is not a sufficient cause to dismiss on appeal. *College* v. *Vaugn*, 525.

A judgment from which there is a suspensive appeal to the Supreme Court cannot be pleaded in compensation; but it is otherwise if the appeal is devolutive. *Sandel* v. *George*, 526.

A motion to dismiss an appeal, which is prematurely filed, will be overruled. *Melson* v. *Sandel*, 531.

The proper time to demand proof of the death of a party to an appeal,

APPEAL, *(Continued.)*

and the appointment and qualification of an administrator, in whose name the suit is revived, is at the time the suggestion of death and motion to revive is made; it is too late for the opposite party to demand it after a trial on the merits—the proof is waived. *Bond* v. *Bishop*, 549.

Where the record does not contain sufficient evidence to enable the Court to determine the rights of parties, the judgment of the District Court will be reversed, and the cause remanded to the District Court for new trial. *Cane* v. *Hart*, 561.

A judgment of the Supreme Court was rendered at the last term of the Court held before the late civil war, affirming the judgment of the District Court, and the Court adjourned before the expiration of the three judicial days necessary to render the judgment final; afterwards, the records of the Supreme Court were destroyed by troops, who occupied the town where the Supreme Court was held: *Held*:—That, on motion, and the fact of the judgment having been rendered and the record destroyed being fully established, and more than three judicial days in term having elapsed, the Court will decree the judgment of the District Court affirmed, and direct the District Court accordingly. *Garland* v. *Roy*, 605.

When an appeal is granted, not on motion for appeal in open Court, but on petition of appeal, service of petition and citation of appeal must be made on the appellee. *Succession of Holmes*, 626.

Where the District Court rendered a judgment making a rule asking the rescission of an order granting an appeal absolute, and the party aggrieved prays an appeal to the Supreme Court from the judgment annulling the order allowing the appeal, the Supreme Court, on mandamus, will compel the District Judge to allow the appeal. *The State* v. *The Judge of the Fifth District Court of N. O.* 628.

Where an appeal bond is not made in favor of the appellees or any obligee, the defect is fatal, and the appeal will be dismissed. *Voelkel et als.* v. *Voelkel et als*, 639.

An appellee in the Supreme Court cannot have the judgment altered in his favor, unless he files an answer asking such alteration, within the time prescribed by law. *Conery* v. *Holmes, et als.* 641.

Where the District Court, misapprehending the law, did not fix the amount of the bond at the time of granting the order of appeal, but fixed the amount of the bond a month afterwards, at which time the bond was filed, the appellant is not blamable, and should not lose the benefit of his appeal. *Succession of Parker*, 644.

The expressions of Article 575 C. P. simply imply that the judgment, to necessitate such a bond of appeal, must be one in which the appellant has been compelled to pay, and is not applicable where the applicant has been compelled to pay nothing. Accordingly, a bond for costs only is sufficient for a suspensive appeal, where

APPEAL, *(Continued.)*

the fund to be divided was in the hands of the Court. *Ib.*

The fixing of the amount of the bond by the Court, one month after the granting of the appeal, was an irregularity, and in conflict with Article 575 C. P., which requires that the amount of the bond shall be fixed when the appeal is allowed; but it is a defect in the *order* of appeal, and, as was said by this Court, in the case of *Dunn* v. *Chaffe*, 10 An. 493, a defect in an order of appeal is an irregularity against which the appellant is protected by the Act of 1839, § 19, No. 53, re-enacted in 1864, No. 82, section 16. *Ib.*

The Court will not entertain a motion to dismiss an appeal from an order of seizure and sale, because there is no assignment of error, bill of exceptions, or statement of facts in the record.

Bayley, Curator, v. *McKnight*, 650.

An appeal must be dismissed on motion where the transcript of the record was not filed on the return day, or within three judicial days thereafter. *Dalton* v. *Mrs. Viasco et al*, 651.

Where a judgment in the District Court was rendered against the principal and surety on an injunction bond, the principal appealed, and the surety on the injunction bond became surety on the appeal bond: *Held:*—That the surety on the injunction bond was a necessary party to the appeal, and could not be surety on the appeal bond. *Cimeo* v. *Danerwheim*, 659.

A party opposed the account filed by the curator representing a succession, on the ground that his claim was a privileged claim, and the curator had failed to place it on the tableau as such, the opposition was dismissed, and the opponent appealed, and only prayed that the curator be cited: *Held:*—That all the creditors of the estate, placed on the tableau of distribution, had an interest in maintaining the judgment, and should have been cited and made parties to the appeal. *Blanchin & Girard* v. *Martinez, Curator*, 699.

Where no citation of appeal has been served on the appellees, and the petition of appeal contains no prayer that they be cited, the appeal will be dismissed. *Nelson* v. *Beaumiller et al.* 700.

Where the Supreme Court has jurisdiction of a cause at the time of appeal, the appeal will not be dismissed on account of a part payment of the judgment, which, if made before appeal, would have reduced the amount below its jurisdiction.

Mrs. Harris v. *Stubenrauch*, 724.

ARBITRATORS.

If the submission does not limit any time, the power of the arbitrators may continue in force during three months from the date of the submission, unless the parties agree to revoke it.

St. Martin v. *Mestaye et als.* 320.

ATTACHMENT.

The proceeding by attachment is merely an incident to the main action; a conservative process provided by law in aid of and to protect the creditor's rights, under certain circumstances, in a suit against the debtor, and, as such, has long been known to and exercised under the common law. *The United States* v. *Murdock*, 305.

The writ of attachment can issue, under certain circumstances, from our Courts, at the suit of any creditor against the debtor, who resides out of the State, and with reference to the property within the jurisdiction of the Court. *Ib.*

As long as the debtor can control his property it is subject to attachment by his creditors. *Ib.*

A creditor, his agent or attorney in fact, praying attachment, must, besides, annex to his petition his obligation in favor of the defendant for a sum exceeding one-half that which he claims, with the surety of one good and solvent person residing within the jurisdiction of the Court to which the petition is presented, as a security for the payment of such damages as such defendant may recover against him, in case it should be decided that the attachment was wrongfully obtained. *Ib.*

A judicial surety cannot demand the discussion of the property of the principal debtor. *Ib.*

The Code of Practice authorizes the property of the debtor to be attached in whatever hands it may be found, and the attachment is effected by service of the process upon the person having in his possession the property of the debtor.

Grieff & Byrnes v. *Betterton*, 349.

In all cases, where the defendant resides out of the State, the plaintiff is entitled to an attachment; the law makes no distinction.

Sandel v. *George*, 525.

Where a suit was commenced on two promissory notes in the State of Kentucky, and a few days after a suit by attachment, on the same notes, was instituted in the Fifth District Court of New Orleans, and the suit in Kentucky carried to final judgment first, and a fi. fa. issued and returned nulla bona: *Held*:—That the judgment thus obtained in Kentucky could be substituted by way of amendment, in supplemental petition, as the cause of action in the Courts of this State, in place of the notes, so as to maintain the attachment. The opinion of the majority in *Wright Williams & Co.* v. *J. J. B. White*, 14 An. 583, sustained.

Jones v. *Murphy & Lewis et als.* 634.

See ACTION.

See PRACTICE.

ATTORNEY AT LAW.

Where the means of a succession are limited, the fees of the attorney will be made to correspond. *Succession of Virgin*, 42.

BANKS AND BANKING.

Whenever a notice of protest for nonpayment of any bank note, as described in the section 19 of the Act, approved March 15th, 1855, shall be lodged in the District Court, verified by the affidavit of the creditor, that the amount is still due and unpaid, it shall be the duty of the Judge of said Court forthwith to order notice of the same to be served upon the Attorney General of the State, and it shall be the duty of the Attorney General, receiving said notice, immediately to ascertain whether there be any legal or equitable defence to the payment of said note; and, if in his opinion, there be no such defence, he shall forthwith apply to said Court, by petition, for a writ of sequestration against all the property and assets of the bank, whose note has been protested as aforesaid, and for judgment of forfeiture; upon filing said petition, such sequestration shall issue, and it shall be the duty of the Court at once to appoint three liquidators, who shall give such security as the Court may order. Said bank shall be allowed three days to answer said writ; the cause shall be heard in preference to all other cases, and should there be no sufficient legal or equitable defence established to the payment of said note, judgment of forfeiture shall be entered up. *Huntington* v. *The Crescent City Bank*, 350.

The Attorney General is the proper person to represent the State, in place of the plaintiff, for the forfeiture of the charter of a bank. *Ib.*

Under the Act of March 18th, 1858, no one but the Attorney General can urge the forfeiture of a bank's charter, and a judgment of forfeiture obtained without his consent and concurrence will be reversed. *Riggin & Co.* v. *Union Bank of Louisiana*, 677.

Where parties extend credit or discount bills of exchange on the faith of a letter of credit, general in its terms, the parties giving the letter of credit are responsible for the amount advanced on the faith of such letter of credit and in accordance with its terms. *Union Bank of Tennessee* v. *Lockett*, 678.

BANKRUPTCY.

See INSOLVENCY.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

To effect the seizure of a negotiable note, before maturity, it must be taken into actual custody by the sheriff. *Miller* v. *Streeder*, 56.

In order to make a valid seizure of tangible property, the thing levied upon must be taken into actual possession by the officer. A promissory note, endorsed in blank by the payee, is of that class of property; it is not merely the evidence of debt: with its endorsements, it contains the obligations of several parties, and is the subject of sale and delivery as much as any other movable. *Ib.*

An endorsee, after maturity, takes the note subject to equities. But when we speak of equities between the parties, it is not to be under-

BILLS OF EXCHANGE AND PROMISSORY NOTES, *(Continued.)*

stood by this expression that all sorts of equities existing between the parties, from other independent transactions between them, are intended; but only such equities as attach to the particular note, and as between those parties, would be available, to control, qualify or extinguish any rights arising thereon. *Ib.*

If the evidence of the right be negotiable, and is acquired without notice by an endorsee, even after the seizure of the right, the seizure is ineffectual as to him—a principle adopted in favor of commerce. But if the evidence of the right be not negotiable, the seizure of the debt or right, of which it is the evidence, by notification to the debtor or keeper of the subject of the right, is valid against the subsequent assignee of the debt or right. *Ib.*

One who pleads the illegality of the consideration of a promissory note, sued upon, must clearly establish it.

McGuigin v. *Ochiglevich*, 92.

Action against the drawer and acceptors of a draft must be made within a reasonable time, otherwise they will be discharged.

Bridgeford & Co. v. *Simonds et als.* 121.

When a party is sued upon his promissory note, and pleads the want of consideration, he must swear to the truth of his allegations in order to obtain a trial by jury. *Letten* v. *Durbridge et al.* 129.

A notice of dishonor of a draft to the drawer, at the post office nearest his residence, is sufficient. *Lallande* v. *Hope*, 188.

The laws of Louisiana do not require witnesses to protests, made by a notary public, of bills of exchange, promissory notes, or orders for the payment of money. *Ib.*

A note payable in gold can be satisfied by the tender of United States Treasury notes of an equal amount. *Jump* v. *Peltier*, 193.

Payment of a note may be proved by parol testimony, and its possession by another is only prima facie evidence of the indebtedness of the maker. *Stewart* v. *McDonald*, 194.

Where a note was given to a bank for a pre-existing debt; *Held*:—That the bank was a bona fide holder for a valuable consideration, but could recover no more than what the evidence showed that debt to be—not the face of the note.

Citizens' Bank v. *Payne & Gilman*, 222.

Though the holder of paper, fairly negotiated, be entitled to recover and to shut out almost every equitable defence, yet the rule applies only to the case of negotiable paper taken bona fide in the course of business, before it falls due. *Marcal* v. *Melliet*, 223.

If taken after it is due and payable, the presumption is against the validity of the demand, and the purchaser takes it as a dishonored bill, at his peril, subject to every defence against it before it was negotiated. *Ib.*

An endorsement extending the time for the payment of a note, made

BILLS OF EXCHANGE AND PROMISSORY NOTES, *(Continued.)*

after its maturity, does not invest it with its original unrestricted negotiable quality. *Ib.*

The general rule is that the form and effect of public and private written instruments are governed by the laws of the place where they are passed or executed; unless it is expressed that they are to have effect in another country. *Trabue & Co.* v. *Short & Co.* 257.

Every endorsement, accommodation or otherwise, is essentially an original contract, equivalent to a new note or bill, in favor of the holder and the acceptor or obligor. *Ib.*

The agreement or obligation of defendants as endorsers, having been entered into in Kentucky, without expressing a different place of performance, must, under the above general rule, be regulated by the law of Kentucky. The fact that the payers reside where the note is payable does not amount to such a designation of the place of performance as to take it out of the general rule. The parties, at the time of making the endorsements, were all in Kentucky, and are presumed by law to have contracted with reference to the laws of that State. *Ib.*

Doubtless, the defendants may be sued at their domicile; but the obligation of their endorsement and the duties of the holders are governed by the laws of Kentucky, where the endorsement was made. *Ib.*

The amount involved being over five hundred dollars, the promise being one to pay money, must be proven by at least one credible witness and corroborating circumstances. *Ib.*

Where, upon the trial below, plaintiff offered as a witness the notary who protested the notes, to prove the facts connected with the tender of the collateral bonds, the defendant objected that the law required the notary, at the time of making protest of the notes, to state therein all the facts connected with the presentment for payment, and that the notary could not testify to anything going beyond the protest, to modify or enlarge the same: *Held*:—That the notary was properly received to prove the facts as regarded the tender of the said bonds, notwithstanding nothing was said about it in the protest, or any statement made by the notary at the time, was a part of the res gestæ in connection with the tender. *Butler* v. *Murison & Co.* 363.

Whoever takes a note after maturity, takes it subject to the equity between the original parties, existing previous to notice of transfer, and acquires no better right than the transferrer had himself; aliter, if transferred before coming due. *Ib.*

To entitle the holder of a promissory note to recover against an endorser, on the ground of a promise to pay made after the latter had been discharged by failure to protest, the plaintiff must show

BILLS OF EXCHANGE AND PROMISSORY NOTES, *(Continued.)*

that the promise was made by the endorser with full knowledge of his discharge. *Ib.*

A note is not void for the want of a revenue stamp, but is simply inadmissible as evidence. *McLearn* v. *Mrs. Skelton*, 514.

This Court cannot sanction an evasion of the laws of Congress. *Ib.*

To entitle the defendant, in an action on a promissory note, to a trial by jury, the affidavit must comply strictly with the requirements of the statute. *Williams, Adm'r, v. Boozeman et al.* 532.

It is no defence to an action on a promissory note, that the amount named in the note was made larger than the real cash amount due on account of expected payment in Confederate money or depreciated currency. *Ib.*

Where a note is given in part payment of an account, and the credit given the maker on account of the note is an amount less than the amount of the note, the maker and the endorser of the note are only liable for the amount credited on the account. *Robson & Allen* v. *McKoin et al.* 544.

A debtor has control of his means of payment, and he can impute them to the payment of any debt he chooses, and sureties have no right to control him in the imputation. *Ib.*

The possession of a promissory note, payable to bearer, is prima facie evidence of ownership, and the holder has the right to institute suit upon it in his own name. *Booty* v. *Cooper*, 565.

Where there is nothing in the record showing lex loci contractus or authorizing it, the Court will not allow interest at the rate of twelve per cent. per annum. *Ib.*

The possession of a negotiable promissory note is prima facie evidence of ownership. *N. O. Canal and Banking Co.* v. *Bailey*, 676.

In an action against the endorser of a promissory note, the petition contained no specific allegation that the defendant had endorsed the note: *Held:*—That the note with the endorsement of the defendant on it, being made part of the petition, the petition conveyed sufficient notice to the defendant of his liability, without the allegation of endorsement. *Drumm* v. *Bradfute et al.* 680.

The certificate of the notary, who protests a note, that he left a notice of protest with a person who was an agent of the party on whom the demand of payment was made, is not prima facie evidence of the agency. A notary can only certify to those matters which the law provides he may certify to. *Ib.*

A party paid a certain sum of money to obtain an extension of time on several notes: *Held:*—That this money could not be plead in part payment of the notes; the sum paid for delay was separate and independent of the notes. The notes formed one contract, the delay another; and the contract for delay was consummated, and

BILLS OF EXCHANGE AND PROMISSORY NOTES, *(Continued.)*

could not be questioned in an action on the notes.

Walker v. *Villavaso*, 715.

A party seeking to recover money paid for usurious interest, must bring his action therefor within one year. *Ib.*

COMMON CARRIERS.

The carrier is not responsible for delay in the voyage on account of boisterous weather, or adverse winds, low tides or the like. These are dangers and accidents of the navigation over which he has no control, and against which his contract contains no warranty.

Lewis and O'Neil v. *Ship Success*, 1.

The law applicable to common carriers is one of great rigor, and discountenances negligence and want of care in them, who are required to transport goods and merchandize for the public, carefully, safely and expeditiously. *Ib.*

If the damage has proceeded from an intrinsic principle of decay, naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must as well as pay the freight, as the master and owners are in no fault; nor does their contract contain any insurance or warranty against such an event. *Ib.*

The value of merchandize at the port of destination is the basis of valuation in contracts of affreightment; and, when goods are damaged in transitu, the market value of the goods at the port of delivery is the standard of damages. *Ib.*

A receipt for goods, in a damaged condition, by the consignee, does not affect his legal rights. *Ib.*

Where goods are delivered in a damaged condition, the burden is upon the defendant to show that they were not responsible for the cause of the damage. *Mahon* v. *Steamer Olive Branch et als.* 107.

Low water is not to be classed among the dangers of the river, which absolve the carrier from his obligation; and he is held to the most exact diligence in the preservation and delivery of property committed to his care. *Ib.*

The common carrier, under the commercial law, is answerable for all losses that do not fall within the excepted cases, of the act of God (perils of the seas) or of public enemies; but he may limit his responsibility by special notice of the liability he means to assume, so that the shipper will be bound to prove negligence or fault in the carrier, in case of loss or damage in the goods shipped.

Brauer v. *Barque Almoner*, 266.

Common carriers are not liable for uncontrollable events—such as the destruction on their boats by the power of heat, etc.

Frank v. *Adams Express Company*, 279.

In order to entitle shippers to recover for alleged damage to merchan-

COMMON CARRIERS, *(Continued.)*

dize, while on a voyage, it must satisfactorily appear that the damage occurred while the merchandize was in charge of the carrier and under his control, and the result of his negligence or want of skill. *Clastrier* v. *The Sun Mutual Ins. Co. of N. O.* 621.

Steamboats and other vessels engaged in carrying passengers are responsible for the loss of all baggage which has been placed in the custody of the officer of the vessel whose duty it is to receive and take care of baggage. *Miss Block* v. *Steamboat Trent et als.* 664.

The Code of this State prohibits a plaintiff from testifying as to the value and nature of the contents of a lost trunk or baggage. The common law rule, in this respect, has never been adopted in this State. *Ib.*

The proprietors of steam tow-boats (such as ply between New Orleans and the Gulf of Mexico) are common carriers, and responsible as such. *Clapp et als.* v. *Stanton & Co.* 683.

By the contract for towing, the captain of a tow-boat is bound to carry vessels safely to their destination, unless prevented by uncontrollable accidents, or such as are not within the control of human foresight or power. If the boat be so much under the influence of the rudder of the ship, it is the duty of the master of the tow-boat to look to it. His undertaking is to tow the vessel in safety, and he has a right to assume all the authority necessary to effect that purpose. The command and care of the vessel towed should either be subject to his command, whilst she is carried by his boat, or her rudder should be placed in the hands of one of his own men. We consider a vessel thus towed as property carried for hire, in which her crew should not be viewed as having any lawful agency. *Ib.*

The plaintiff, a drayman, contracted to haul and deliver to a vessel, loading at the port of New Orleans, sixty-four bales of cotton. The cotton was hauled to the vessel and placed on the levee, at a place near the vessel, which place was pointed out by the mate of the ship. The drayman, at the request of the officers of the vessel, covered the cotton with a tarpaulin; the officers of the vessel then refused to sign a receipt for the cotton, alleging that they would not receipt for freight at so late an hour in the day: *Held*:—That the cotton was in the custody of the vessel, and the vessel responsible therefor as a common carrier, and must pay for the loss of one of the bales taken away during the night.

Roth v. *Captain and Owners of the Brig Terry*, 705.

The drayman, having paid his employer the value of the bale of cotton lost, brought this action against the vessel to recover the amount so paid: *Held*:—That there was no privity between the drayman and the vessel; that the mere payment to the owner of the cotton of the value of the cotton lost, did not subrogate the drayman to

COMMON CARRIERS, *(Continued.)*

the right of action the owners of the missing bale of cotton had against the vessel, either for the bale or its value. *Ib.*

Damages should be established by sale before a judgment for the recovery of damages can be had against a carrier, for goods damaged while entrusted to his care. *Smith* v. *Barque Wall et als.* 724.

COMMUNITY.

The partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both, because, in that case, the period of time when the purchase is made is alone attended to, and not the person who made the purchase. *Huntington, Adm'r,* v. *Widow Legros,* 126.

At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless they satisfactorily prove which of such effects they brought in marriage, or have been given them separately, or they have respectively inherited. *Ib.*

The declaration is an authentic act, that property was acquired by a partner in community with separate funds, does not relieve that person from the burden of proving that fact aliunde. *Ib.*

See HUSBAND AND WIFE.

See EVIDENCE.

CONFLICT OF LAWS.

As a general rule, the validity and effect of a contract are to be determined by the law of the place where it is made; if it is valid there, it is, under the general law of nations, valid everywhere, by the implied consent of the parties. But the rule is subject to the exception, that no nation is bound to recognize or enforce contracts injurious to its own citizens or subjects; and the enforcement, by one nation, of contracts made under the laws of another, rests on a principle of comity, which cannot be so far extended as to violate the positive legislation of the other.

Galliano v. *Pierre & Co.* 10.

The legal damages for a failure to pay a stipulated amount in gold, cannot possibly exceed that amount in any lawful currency. *Ib.*

The general rule is, that the form and effect of public and private written instruments are governed by the laws of the place where they are passed or executed; unless it is expressed that they are to have effect in another country. *Trabue & Co.* v. *Short & Co.* 257.

The right of the United States to sue in our Courts, cannot now be con-

CONFLICT OF LAWS, *(Continued.)*

sidered an open question, if a doubt could have ever existed.
The United States v. *Murdock*, 305.

As a general rule, the Government of the United States, in its proceedings in its own Courts, and the Courts of the States to which in civil actions it may resort, can only act through its offices and officers established by law, and that it is made the duty of the District Attorney, in each district, under the superintendence of the Treasury Department, to prosecute all civil actions in which the United States shall be concerned. *Ib.*

The Government, as a sovereign, cannot be sued in State Courts. *Ib.*

The acknowledgment of the right of the Government to come into our Courts, and its immunity from suit, by virtue of sovereignty, carries with it the right to the use, in its sovereign capacity, of all the conservatory writs common to other suitors. *Ib.*

Our laws have always permitted Frenchmen to enjoy the right of possessing and owning property in Louisiana, and under the treaty of 1853, they cannot be subjected to taxes on transfers, inheritance, or any others, different from those paid by the citizens of the United States, or to taxes which are not equally imposed.
Succession of Amat, 403.

It has been settled, by frequent decisions of this Court, that, in order to enable the Courts of this State to give effect here to a judgment rendered in another State, the whole record of the proceedings, under which the judgment was obtained, must be produced, in order to show how far it may be conclusive. The transcript must show that the proceedings are clothed with the forms necessary to the validity of a judgment in the State from which it comes. It must also show that the defendant had due notice, or that he actually appeared. In the absence of evidence, either impeaching a foreign judgment or going to show that it had not, under the laws of the State where it was rendered, the effect of a final judgment, our Courts are bound to consider it as having the force of the thing adjudged. *Hockaday* v. *Skeggs*, 681.

CONSTITUTION.

In order that no inconvenience may result to the public service from the taking effect of the Constitution, no officer shall be superceded thereby; but the laws of this State relative to the duties of the several officers, executive, judicial and military, except those made void by military authority, and by the ordinance of emancipation, shall remain in full force, though the same be contrary to this Constitution; and the several duties shall be performed by the respective officers of the State, according to the existing laws, until the organization of the Government under this Constitution, and

CONSTITUTION, *(Continued.)*

the entering into office of the new officers to be appointed under said Government, and no longer.

Ex. rel. Walsh v. *Knickerbocker*, 180.

The District Attorneys shall be elected by the qualified voters of their respective districts, for a term of four years. Constitution of 1864. *Ib.*

CONTRACTS.

As a general rule, the validity and effect of a contract are to be determined by the law of the place where it was made; if it is valid there, it is, under the general law of nations, valid everywhere, by the implied consent of the parties. But the rule is subject to the exception, that no nation is bound to recognize or enforce contracts injurious to its own citizens or subjects; and the enforcement, by one nation, of contracts made under the laws of another, rests on a principle of comity, which cannot be so far extended as to violate the positive legislation of the other. *Galliano* v. *Pierre & Co.* 10.

The legal damages for a failure to pay a stipulated amount in gold, cannot possibly exceed that amount in any lawful currency. *Ib.*

In every contract a tender of the article is necessary to put the party in default; and it is at the risk of the vendor until it is so tendered.

Blackman v. *Hoey*, 23.

It is equally necessary that the plaintiff should put the defendant in default before bringing his action. *Ib.*

A legal agreement is a concurrence of two minds upon the object and consideration of a contract. The will of both parties must unite on the same point. *Holtzman* v. *Millaudon*, 29.

Every one is at liberty to renounce what the law has established in his favor and interests but himself. But individuals cannot, by their conventions, derogate from the force of laws made for the preservation of public order or good morals.

Mrs. Broadwell v. *Rodrigues*, 68.

The law of Louisiana allows individuals to derogate, by their conventions, from any advantages which the general law may have allowed them, under three modifications: 1. That the law granting the advantage be not one expressly or impliedly prohibitory of such renunciation; 2. That the renunciation do not affect the right of third persons; and 3. That the renunciation be not contrary to the public good. *Ib.*

The owner of property may lawfully contract in relation to it, and he is constrained by no law, as to the terms and conditions on which he may dispose of or affect it, except in cases for which the law itself has provided. *Ib.*

A mortgage debtor may legally renounce the benefit of appraisement in the proceedings to sell on executory process, and will not be afterwards allowed to attack the sale as invalid. *Ib.*

CONTRACTS, *(Continued.)*

Individuals cannot, by their convention, derogate from the force of laws made for the preservation of public order or good morals.
Jex v. *Keary*, 81.

But, in all cases in which it is not expressly and impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and it is not contrary to the public good. *Ib.*

When parties enter into a contract, the contract is to be regulated by the laws in force at the time, and not by laws subsequently made; though the Legislature may pass laws subsequent to the contract, directing the manner in which the rights of the parties thereto may be secured and enforced. It may extend or restrict the remedy, but it cannot exclude *all* remedy. *McDonald* v. *Stewart*, 90.

Where a second agreement has been entered into, which is conditional, and the party fails to comply with the obligations assumed therein by him, the original contract takes effect as the only one between the parties. *Widow de St. Romes* v. *Sourdes & Chassaignac*, 127.

A contract produced by violence or threats is void, although the party in whose favor the contract is made, did not exercise the violence or make the threats, and although he were ignorant of them.
Emerson v. *Lee*, 134.

Agreements, legally entered into, have the effect of laws on those who have formed them. *Bennett & Lurges* v. *Robinson*, 204.

They cannot be revoked, unless by mutual consent of the parties, or for causes acknowledged by law. *Ib.*

They must be performed with good faith. *Ib.*

Held:—That Article 2229 contemplates the formation and origin of the contract, not its execution.
Widow de St. Romes v. *City of New Orleans*, 210.

When the obligor fulfills his obligation in doing what he has bound himself to do, he does not contract nor agree, he complies with his obligation; contracting or agreeing is one thing, and the fulfilling of the obligation is another. *Ib.*

Where a pretended owner of a steamboat has repairs made and materials furnished the steamboat, on the credit of his ownership and for his apparent advantage as owner, he cannot escape responsibility by setting up that he was not the owner of the steamboat at the time the repairs were done and materials furnished.
Hailey v. *Franks et al.* 559.

Promissory notes, and other obligations for the payment of money, made during the late war, the maturity of which was made dependent on a treaty of peace between the then belligerents, became matured, by the lapse of the time agreed on, after the cessation of hostilities between the belligerents. *Gaines* v. *Dorsett*, 563.

Trade with the enemy during active hostilities is illegal, and parties

CONTRACTS, *(Continued.)*

engaged in such trade acquire no rights thereby that can be enforced in Courts of justice. *Marchand* v. *Coyle*, 632.

The proprietor has a right to cancel, at pleasure, the bargain he has made, even in case the work has already commenced, by paying the undertaker the expense and labor already incurred, and such damages as the nature of the case may require.

Moore v. *Howard*, 635.

Where the proprietor has cancelled a contract made with an undertaker for the erection of a building, the Court will not award the undertaker the full amount he was to receive for the entire services necessary to complete the building, but will award the amount of profit which he would make on the contract, if completed. *Ib.*

Where a merchant furnishes goods to a party, on the faith of the verbal promise of a third person to accept a bill of exchange for the amount, and, after the goods are delivered, refuses to accept in writing: *Held*:—That the party furnishing the goods can recover of the party who promised to accept, and the provisions of the Act of March 18, 1858, requiring written proof in certain cases, does not apply. *Crowell, Receiver*, v. *Van Bibber & Co*, 637.

Laws in derogation of the commercial law are strictly construed, and without a clearer expression of the intention of the law-making power, that the statute of 1858 is intended to restrain the commercial law in the particular under consideration, we are not inclined to give the statute that interpretation. *Ib.*

Default is not a necessary prerequisite to the rescission of a contract, when the party sued for its rescission has made an actual breach thereof. *McNeil* v. *Dr. Knapp et al.* 701.

CONFUSION.

When the qualities of debtor and creditor are united in the same person, there arises a confusion of right which extinguishes the two credits. *Succession of Norton*, 36.

CORPORATIONS.

Corporations must not only be authorized by the Legislature, but a name must be given to them; and it is in that name they must sue or be sued, and do all their legal acts, although a slight alteration in this name be not important.

Bridgeford & Co. v. *Hall et al.* 211.

It is not necessary to record the charter of a corporation in the office of the Secretary of State. *Ib.*

The Act of March 14th, 1855, organizing corporations, does not come in conflict with the Article 115 of the Constitution of 1852, and is therefore constitutional. The law embraces but one object.

Ib.

The right to construct and to own boats necessarily includes the right to employ or navigate them. *Ib.*

CORPORATIONS, *(Continued.)*

Where the holder of the stock of a private corporation, which stock had not been fully paid up, has his stock declared forfeited by the corporation on account of non-payment of installments due: *Held:* That the forfeiture of the stock dissolved the stockholder's connection with the corporation, and he cannot be held liable by creditors of the corporation for the amount unpaid on such stock in proceedings in insolvency. *Macaulay* v. *Robinson*, 619.

The Belleville Iron Works Company, a corporate body domiciled in New Orleans, came into Court and made a voluntary cession of its property, and after due proceedings had, an order was made staying all proceedings against the corporation, and a syndic was appointed; a short time after the order was granted, a creditor of the corporation brought an action to recover an amount due him from the corporation, and prayed that the order staying proceedings against the corporation be annulled; after trial, the Court rendered judgment annulling the order, as prayed for: *Held:*—That all subsequent proceedings on the part of the Belleville Iron Works Company, taken to perfect the cession of their property in settlement of its debts, were void, as the order staying poceedings and appointing a syndic was annulled.
Jeffries v. *Belleville Iron Works Co.* 685.

Corporations have no right, under the laws of Louisiana, to make a voluntary cession of their assets to their creditors and obtain the benefit of the insolvent laws. *Ib.*

COURTS.

Courts have no power to render a judgment payable in one kind of money only, when Congress has established different kinds of money, making them a legal tender for the payment of all moneyed obligations. *Olanyer* v. *Blanchard, Jr.* 616.

Where the rules of the District Court require causes to be fixed for trial on the first day of the term, it is error to fix a cause for trial on the second day of the term. *Walker* v. *Ducros*, 703.

Courts are clothed with power to prescribe such rules of proceeding appertaining to their jurisdiction as may be necessary and useful in the exercise of their functions, and which have not been established by law. These rules become, in effect, laws, which may be modified or repealed by the power from which they emanate, but they ought not to be relaxed or suspended to meet temporary convenience or be accommodated to the ever varying circumstances of time. The evils that would arise from a vacillating and uncertain operation of such rules are more and greater than any that would by such lax operation be obviated. *Ib.*

CRIMINAL LAW.

When the indictments in these cases were presented, the Court made the following order: "In this case it is ordered that the accused,

CRIMINAL LAW, *(Continued.)*

when arrested, be allowed to give bond and security in the sum of one thousand dollars, and that the sheriff be authorized to take and approve said bond." *Held*:—That this order conferred on the clerk authority to issue a bench warrant for the arrest of the accused, and also empowered the sheriff to take and approve the bail bonds. *State* v. *Gordon et al.* 528.

After an order for an arrest, in a criminal proceeding, has been made, no additional order, specially directing the clerk to issue a bench warrant, is necessary. *Ib.*

The issuing of a bench warrant is a mere ministerial act, for the performance of which it is not necessary that the clerk should possess judicial powers, conferred on him by law or delegated to him by the Court. *Ib.*

Where one party relies on and offers a portion of a record as evidence, the adverse party has the right to produce the whole of the record in evidence. *Ib.*

On a motion to enter up judgment against the principals and sureties on a bail bond, it is sufficient to assign as a reason for judgment that the bond was called, and the accused failed to appear in compliance therewith. *Ib.*

An indictment charged that the defendant "did lie in wait and shoot with a dangerous weapon, with intent to commit the crime of murder upon one." etc: *Held*:—That this allegation is uncertain and indefinite, and subject to two meanings, and is not in language equivalent to the words of the statute upon which it is based. *State* v. *Charles*, 720.

DAMAGES.

In the assessment of damages, in cases of offences, quasi-offences and quasi-contracts, much discretion must be left to the Court or jury. *Rayne* v. *Taylor*, 26.

Interest can only be allowed from the date of the judgment liquidating the damages in an action of trespass, not from judicial demand. *Robertson* v. *Green & Brummel*, 28.

Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it. *Bissel* v. *Terrell*, 45.

Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence or his want of skill. *Ib.*

Although the general rule is that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived; yet, there are cases in which damages may be assessed without calculating altogether on the pecuniary loss or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether

DAMAGES, *(Continued.)*

in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule. In the assessment of damages under this rule, as well as in cases of offences, quasi-offences and quasi-contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnify the creditors, whenever the contract has been broken by the fault, negligence, fraud, or bad faith of the debtor. *Block* v. *McGuire et al.* 417.

Where an architect or other workman has undertaken to erect a building by the job, the workman or architect is answerable in damages when his work falls to ruin, in whole or in part, on account of the badness of his materials or work, but is not liable for unfitness of soil, or for the refusal of the owner to have the excavations in the soil properly prepared for the building.

Powell v. *Markham*, 581.

A writ of attachment is not allowed by law in a case sounding in damages, where the damages arise from tort, and are not liquidated.

West et als. v. *Mrs. Chew, Ex.* 630.

Where a party asks damages on the ground of being deprived of the realization of expected profits, the contemplated gains and profit must be proved to be absolute and certain.

Gebelin v. *Hamilton et al.* 646.

DEBTOR AND CREDITOR.

The sale or transfer of a debt includes everything which is an accessory to the same as suretyship, privileges and mortgages.

Jeckell v. *Fried*, 192.

DIVORCE.

An acknowledgment of the truth of the facts alleged in the petition is insufficient to support the demand for a divorce.

Succession of Weigel, 49.

Married persons may reciprocally claim a separation and divorce on account of habitual intemperance, excesses, cruel treatment, or outrages of one of them towards the other, if such intemperance or such ill treatment is of such a nature as to render their living together insupportable; but where there is a condonation or reconciliation after the offence, it waives the right to claim a divorce.

Mrs. Halls v. *Cartwright*, 414.

Per Curiam:—Public policy, good morals, the highest interests of society require that the marriage relations should be surrounded with every safeguard, and their severance allowed only for the causes specified by the law, and clearly proven. *Ib.*

DIVORCE, *(Continued.)*

Two separate decrees are required for a divorce a vinculo, and a separation a mensa et thoro, preceding it. *Gernon* v. *Hickey*, 454.

DONATIONS.

A donation made to a minor under the age of puberty must be accepted by his tutor. *Widow Barnabe* v. *Mrs. Sauer et ux.* 148.

A minor arrived at the age of puberty, but not emancipated, must accept it under the authorization or with the concurrence of his curator. *Ib.*

Nevertheless, the parents of a minor, whether he be arrived at the age of puberty or not, whether he be or be not emancipated, and the other legitimate descendants, even in the lifetime of the parents, though they be neither tutors nor curators to the minor, may accept for him. *Ib.*

An act shall be passed before a notary public and two witnesses, of every donation inter vivos of immovable property, or incorporeal things, such as rents, credits, rights or actions, under the penalty of nullity. *Ib.*

Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed. *Ib.*

All donations inter vivos, made by persons having neither children nor descendants, actually living at the time of the donation, of whatever value those donations may be, and on whatever account they may have been made, should they even be mutual, not excepting such as were made in favor of marriage by any but the ascendants of the married persons, or by the one of them to the other, shall be considered as revoked up to the disposable portion by the birth of children to the donor, even of a posthumous child, or by the legitimation of a natural child by a subsequent marriage, if the child be born since the donation. *Ib.*

Donations inter vivos are liable to be revoked or dissolved on account of the following causes: 1. The ingratitude of the donee; 2. The non-fulfillment of the eventual conditions which suspend their consummation; 3. The non-performance of the conditions imposed on the donee; 4. The legal or conventional return. *Ib.*

Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible, in any popular or secondary sense, of which, with reference to these circumstances, they are capable. *Ib.*

It is the province of courts of law, in the interpretation of last wills and testaments, to endeavor to ascertain the intention of a testator, and

DONATIONS, *(Continued.)*

to give effect thereto; provided the ascertained disposition be not contrary to law and public policy.

Succession of Mrs. Foucher, 409.

The testamentary disposition becomes without effect, if the person instituted or the legatee does not survive the testator. *Ib.*

The instituted heirs having taken the whole succession of the testatrix, no part of it could pass by representation to the heirs of a collateral, whose rights as testamentary heir became legally divested by his predecease. *Ib.*

Accretion takes place for the benefit of the legatees, in case of the legacy being made to several conjointly. *Ib.*

The legacy shall be reputed to be made conjointly, when it is made by one and the same disposition, without the testator's having assigned the part of such co-legatee in the thing bequeathed. *Ib.*

Bastards, adulterous or incestuous children, who are prohibited by law from inheriting anything more than mere alimony, cannot take property as legatees. *Bennett* v. *Cane et als.* 590.

Where children are prohibited by law from receiving property as heirs, they cannot receive as legatees by last will. *Ib.*

The law reprobates the begetting of illegitimate children, and only grants to natural children, i. e. those illegitimate children who have been acknowledged by their natural parents, the right to receive from their natural parents by donations mortis causa beyond what is necessary to procure them sustenance, or an occupation or profession. *Ib.*

An estate is liable for all costs incurred by an executor in endeavoring to sustain the validity of a will which is afterwards declared void.

Girard v. *Babineau, Adm'r*, 603.

But where heirs institute a direct action against the legatees, to have the will annulled, and are successful, the estate is not chargeable with the costs and charges incurred by the legatees in their attempt to sustain the will. *Ib.*

EVIDENCE.

A commission certified in the following manner :—"In witness whereof I have hereunto set my hand and my official seal, at St. Louis, Missouri, the day and year above written. (Signed) Charles H. Tillson, commissioner"—is sufficient. *Bissel* v. *Terrell et al.* 45.

Evidence may be received in explanation of an authentic act when it does not contradict, vary, alter, enlarge or restrict it.

Barnebe v. *Mrs. Sauer et ux.* 148.

There can be no reason given why the whole record of a suit should be introduced in evidence for the sole purpose of proving admissions in answers to interrogatories. *Murison & Co.* v. *Butler et al.* 197.

Courts may, at the request of one of the parties, decree that the other party bring into Court the books, papers, and other documents,

EVIDENCE, *(Continued.)*

which are in his possession, and which are material in the cause, provided the party requesting their production declares, in writing and on oath, what are the facts he intends to establish by such books, papers or other documents; and, on the refusal of the party thus called upon to comply with the order of the Court, the facts stated and sworn to shall be considered as having been confessed, until satisfactory evidence be shown of the impossibility of producing such documents. *Ib.*

The day fixed for the trial of a suit shall be the day that the judge shall fix in his order for the production into Court of books, papers or other documents that are in possession of parties to a suit. *Ib.*

When an instrument in writing, containing obligations which the party wishes to enforce, has been lost or destroyed by accident or force, evidence may be given of its contents, provided the party show the loss, either by direct testimony or by such circumstances, supported by the oath of the party, as render the loss probable; and in this case the judge may, if required, order reasonable security to be given to indemnify the party against the appearance of the instrument, in case circumstances render it necessary.

Polhamius & Jackson v. *City of N. O.* 234.

Answers by one co-defendant on propounded interrogatories cannot be taken as against the others. *Collins* v. *His Creditors*, 235.

A party accused of fraud cannot be permitted to testify as a general witness, on the ground of interest. *Ib.*

Papers registered in the Custom-house at New Orleans, when under the control of the so-called Confederate States Government, have no legal entity, and copies are not evidence for any purpose in our Courts. *Succession of Alexander*, 337.

Where documents are received without objection, although illegal, they will be taken as evidence, but it will not be entitled to much weight. *Ib.*

Where no exception is taken to the admission of a contract in evidence, at the trial of a cause in the Court a qua, on account of the absence of a United States revenue stamp, the Supreme Court will presume that the original, offered in the District Court, was properly stamped. *Roberts* v. *Murray*, 572.

Parol evidence cannot be admitted to change the terms of a written contract, or to enlarge or restrict its meaning.

City of Shreveport v. *Le Rosen*, 577.

Admissions by a deceased person, proved by a witness who cannot be contradicted, much less convicted of perjury, are the weakest kinds of evidence, and scarcely worthy of any belief.

Coeler v. *Succession of Abels*, 617.

A clerk who receives, as remuneration for his services, a certain per

EVIDENCE, *(Continued.)*

centage of the profits made by his employer, is a competent witness for his employer. His interest is too remote to disqualify him on the ground of interest in the result of the suit.

Wright & Maury v. *Rogers*, 671.

EXECUTORS AND ADMINISTRATORS.

When an order of seizure and sale was obtained by an administrator, without evidence that he is the administrator: *Held:*—That the omission to produce such evidence is fatal, and the order will be rescinded. *DeBrueys, Adm'r*, v. *Freret*, 80.

An administrator has the right to leave the State, on his leaving with some person residing in the parish, or in an adjoining parish, where the succession is opened, a general and special power of attorney to represent in all the acts of administration, and depositing an authentic copy of the power of attorney before departure, in the office of recorder of mortgages in and for the parish where said succession has been opened, which power of attorney must be duly registered. *Succession of Fellmeyer*, 153.

A demand to account upon an administrator must be by petition and citation; it cannot be made by rule. *Ib.*

Where it is attempted to prove an acknowledgment, made by the representative of a deceased person, of a debt contracted by said deceased, the proof should be direct and unambiguous. The Code of Practice has prescribed how such proof may be made, and those who do not adopt that mode should not complain if they are required to adduce proof of strict legal certainty.

Wilson, Ex'r, v. *Mrs. Early et. als.* 219.

Under Article 1057 of the Code of Practice, the judge is authorized to order the execution against an administrator, personally, who makes a vague and insufficient answer to a rule, under Arts. 1088, 1056, C. P., taken by creditors whose claims have been fixed by a final judgment upon the administrator's account.

Succession of Philbrick, 220.

Summary proceedings are only to be used when prescribed by law.

Succession of Maria Moore, 512.

No provision of law authorizes the administrator of a succession to recover property by rule or summary process. His remedy is by ordinary process. *Ib.*

Articles 398 and 387 of the Civil Code must be construed in connection.

State v. *The Judge of the Twelfth Judicial District*, 523.

Article 387 C. C. confers on the Court full discretionary power in the appointment of administrators pro tempore. *Ib.*

Article 398 C. C. leaves the Court no further discretion after appointment of administrator pro tempore and he has entered upon his duties. *Ib.*

The Court cannot rescind the appointment without good legal cause. *Ib.*

GARNISHEE.

There is no law requiring a personal service of a notice of garnishment; the law requires a personal service of the interrogatories as an exception to the general rule, but this Court cannot extend it to any other service. *Schindler* v. *Smith et als.* 475,

The laws of attachment must be strictly construed and applied, otherwise they will not avail the attaching creditor. *Ib.*

The Act approved March 18, 1858, p. 176, provides that no seizure shall bind any property or effects, rights or claims in the hands of a garnishee, either under process of attachment or fieri facias, unless service of the interrogatories has been personally made upon such garnishee. *Ib.*

The garnishee, in the eyes of the law, is a mere stakeholder, a custodian of the property attached in his hands; he has no pecuniary interest in the matter; he has no costs to pay, and therefore none to save; his business is to let the law take its course between the litigants; he has no right to accept or waive service of the proceeding, thereby favoring one party at the expense of and injury to another, and creating actually a privilege with priority in favor of one creditor to the prejudice of another. *Ib.*

Garnishees cited to appear and answer through their agents, cannot be made liable by the answers of their agents. *Lewis* v. *Franks*, 564.

HOMESTEAD ACT.

The rights granted the widow or minor children of a deceased person, by the Homestead Act of 17th March, 1862, vest in them at the time of the death of the deceased, provided their condition of life at that moment of time entitle them to the benefit of the provisions of the act; their pecuniary circumstances at the time of death of the insolvent, and not at any subsequent time, settles their right to any claim under the act. *Succession of Norton*, 36.

A widow or orphan must be a resident of the State at the time of the decease of the husband or father, in order to obtain the benefit of the Homestead Law. *Ib.*

HUSBAND AND WIFE.

Where there is no evidence to show that the wife administered her paraphernal property, alone and separately, it is presumed and considered that the husband administered it; and he is accountable to the succession for all moneys received and used by him belonging to it. *Johns et al.* v. *Race*, 105.

The partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even al-

HUSBAND AND WIFE, *(Continued.)*

though the purchase be only in the name of one of the two, and not of both, because, in that case, the period of time when the purchase is made is alone attended to, and not the person who made the purchase. *Huntington, Adm'r,* v. *Widow Legros,* 126.

At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless they satisfactorily prove which of such effects they brought in marriage, or have been given them separately, or they have respectively inherited. *Ib.*

The declaration is an authentic act, that property was acquired by a partner in community with separate funds, does not relieve that person from the burden of proving that fact aliunde. *Ib.*

Where the wife retains the administration of her paraphernal property the husband has no right to give a privilege to sub-lease, or exercise any other power concerning it, without her authority.

Wolls v. *Collins et al.* 470.

A lease is a commutative contract, and as to the resolutory condition, is governed by the dispositions of Articles 2040, 2041. *Ib.*

The husband has the administration of his wife's dowry.

Virginie Tausin v. *Deblieux,* 585.

Where the wife's dowry consists of money, and the husband loans the money and takes a note therefor in his own name, the note is his property; the wife has no property in the note; her husband is indebted to her for the amount of money he has taken from her dowry. *Ib.*

Paraphernal property which is not administered by the wife, separate and alone, is considered under the administration of the husband.

Rachal v. *Le Roux, her Husband,* 588.

Where there is no evidence showing that the wife administered her paraphernal property separately and alone, it is the presumption that the husband used the funds for his own use. *Ib.*

A married woman cannot sue her husband for alimony, except incidentally in a principal demand for separation from bed and board, or divorce. *Moore* v. *Moore,* 614.

Where a wife sues her husband for alimony, alleging that he refuses to provide for her support, and, before the trial of the cause, the husband and wife are reconciled, and he is living with her, and provides a suitable maintenance for her: *Held:*—That the husband may plead such reconciliation and compliance with his obligations, at the trial, as a peremptory exception; and, if sustained, it is the duty of the Court to dismiss the action.

Jennie B. Holbrook v. *Her Husband,* 643.

The wife cannot arrest the sale of the husband's property seized in execution, on the mere ground of preference over the seizing creditor.

Marot v. *Ferriere,* 665.

INJUNCTION.

The right of plaintiff to execute the judgment which he has obtained for a sum of money, can only be suspended upon a petition, affidavit and bond given for an injunction.

The State v. *The Judge of the Fourth D. C. of N. O.* 110.

An injunction may compel a party to do, as well as to restrain him from doing an act. *Pierce* v. *City of N. O.* 242.

INSOLVENCY AND INSOLVENT PROCEEDINGS.

With the exception of special privileges, which exist on immovables in favor of the vendor, of workmen and furnishers of materials, as declared above, the debts privileged on the movables and immovables generally, ought to be paid, if the movables are insufficient, out of the products of the immovables belonging to the debtor, in preference to all other privileged and mortgaged creditors. The loss which may then result from their payment must be borne by the creditor whose mortgage is least ancient, and so in succession, ascending according to the order of the mortgages, or by pro rata contributions, where two or more of the mortgages have the same date. *Deverges* v. *His Creditors*, 169.

When the debts privileged on the movables and immovables cannot be paid entirely, either because the movable effects are of small value, or subject to special privileges which claim a preference, or because the movables and immovables together do not suffice, the deficiency must not be borne proportionally among the debtors, but the debts must be paid according to the order established above, and the loss must fall on those which are of inferior dignity. *Ib.*

Any agreement of the debtor to buy the vote of a creditor, by giving security for the payment of his debt, must be considered as fraudulent, and the creditor whose vote is thus bought cannot recover the amount of his debt against the surety furnished by his debtor, as the contract must be considered as a perversion of the course of justice, and a fraud upon the Court charged with the homologation of the deliberations of the creditors.

Weaver v. *Waterman*, 241.

Section 8 of the Act of 1855, p. 432, declares that, after the cession and acceptance, all the property surrendered by an insolvent shall be fully vested in his creditors: and the syndic shall take possession of and be entitled to claim and recover all the property, and to administer and sell the same according to law; but the repealing clause of the act retains what is in the Civil Code and Code of Practice not contrary to its provisions; and, according to the terms of the Civil Code as well as the statute of 1855, it seems clear that this transfer is for specific purposes, to be sold according to law, and the proceeds distributed in concurso among the creditors. They cannot hold it in common, nor partition it in kind. The debtor or

INSOLVENCY AND INSOLVENT PROCEEDINGS, *(Continued.)*

insolvent has a residuary interest, which may become fixed and availing in a certain contingency.

Laforest v. *His Creditors et al.* 292.

In matters of insolvency the law does not contemplate that a majority of the creditors shall deprive the minority of the right of having their claims paid within a reasonable delay. If they have the right to hold and enjoy the property for any fixed period, they have, at its expiration, the right to fix another, and thus compel all the creditors to remain joint owners indefinitely. *Ib.*

A tableau of distribution, by its very name, implies a control over the fund to be distributed. *Rochereau et al.* v. *Harvey et al.* 391.

A debtor who is insolvent, and against whom proceeding to compel a surrender of property, can do nothing to impair the rights of his creditor. *Benit* v. *Her Husband*, 67.

The Belleville Iron Works Company, a corporate body domiciled in New Orleans, came into Court and made a voluntary cession of its property, and after due proceedings had, an order was made staying all proceedings against the corporation, and a syndic was appointed; a short time after the order was granted, a creditor of the corporation brought an action to recover an amount due him from the corporation, and prayed that the order staying proceedings against the corporation be annulled; after trial, the Court rendered judgment annulling the order, as prayed for: *Held:*—That all subsequent proceedings on the part of the Belleville Iron Works Company, taken to perfect the cession of their property in settlement of its debts, were void, as the order staying proceedings and appointing a syndic was annulled.

Jeffries v. *Belleville Iron Works Co.* 685.

Corporations have no right, under the laws of Louisiana, to make a voluntary cession of their assets to their creditors and obtain the benefit of the insolvent laws. *Ib.*

INTERROGATORIES ON FACTS AND ARTICLES.

Where interrogatories were propounded to plaintiff, and parol testimony was adduced to show the capacity of the officer taking them, without objection, they cannot be afterwards objected to.

Letten v. *Durbridge et al.* 129.

Interrogatories having been propounded, answered and offered, and received in evidence, together with the affirmative answers, without any objection, the Court will give to them their full effect.

Cull v. *Herwig et als.* 315.

Where the answers to interrogatories on facts and articles, all taken together, present a comptete answer to all the interrogatories, taken together, the Court will not order one of the interrogatories to be taken as confessed, for the reason that the answer to that particular

INTERROGATORIES ON FACTS AND ARTICLES, *(Continued.)*

interrogatory appears evasive, it appearing that it has been fully answered in the answer to another interrogatory.

Bond v. *Bishop*, 547.

The answers of a party interrogated on facts and articles, form a part of the pleadings, and either party may use them without formally introducing them in evidence, in the same manner as either party may have the benefit of any admission in the petition or answer. They belong to the record, from which they cannot be withdrawn.

Walker v. *Villavaso*, 715.

So, where interrogatories on facts and articles are propounded to a party, and are taken for confessed, the order of the Court taking the interrogatories for confessed, stands in lieu and place of the answers, and form a part of the record. *Ib.*

When a record in a cause, in which interrogatories on facts and articles have been taken for confessed, is offered in evidence, the order of the Court taking the interrogatories for confessed, stand in lieu and place of the answers, and form a part of the record offered in evidence. *Ib.*

And this, although the interrogatories so taken for confessed were filed in another suit between the same parties and for the same cause of action, and which suit had been dismissed by plaintiff after the interrogatories had been taken for confessed. *Ib.*

Where interrogatories on facts and articles are taken for confessed as against plaintiff, and the suit subsequently dismissed by plaintiff, the defendant has the right to use them in evidence in a subsequent suit between the same parties for the same cause of action. *Ib.*

INTEREST.

Interest can only be allowed from the date of the judgment liquidating the damages in an action of trespass, not from judicial demand.

Robertson v. *Green & Brummell*, 28.

Where there is nothing in the record showing *lex loci contractus* or authorizing it, the Court will not allow interest at the rate of twelve per cent. per annum. *Booty* v. *Cooper*, 585.

The agreement to pay a greater interest than that allowed by law to be contracted for, makes that part of the contract null and void, and produces no legal effect between the parties contracting, and is the same as if no agreement had been entered into relative to interest.

Tarver v. *Winn*, 557.

When there is no stipulation to pay interest on a debt, it bears interest at the rate of five per cent. from the time it becomes due. *Ib.*

A contract to pay a higher rate of interest than eight per cent. per annum, is usurious, unless the interest agreed upon be included in a written obligation and form a part of the amount for which the written obligation is given, and the penalty for a usurious contract is the forfeiture of the entire interest so contracted. He who pays

INTEREST, *(Continued.)*

such usurious interest can recover the amount so paid by him, if he sue for it within twelve months from the time of payment.

Walker v. *Villavaso*, 712.

See BILLS OF EXCHANGE.

INSURANCE.

Where there are written and printed stipulations in a policy of insurance, the written clause must control, if they are irreconcilable with each other. *Gross* v. *Citizens' Insurance Company*, 97.

JUDGMENT.

Before a cause is at issue, either expressly or tacitly, a final judgment cannot be validly rendered. *Braunsdorff* v. *Fay & Mason*, 187.

It has been settled, by frequent decisions of this Court, that, in order to enable the Courts of this State to give effect here to a judgment rendered in another State, the whole record of the proceedings, under which the judgment was obtained, must be produced, in order to show how far it may be conclusive. The transcript must show that the proceedings are clothed with the forms necessary to the validity of a judgment in the State from which it comes. It must also show that the defendant had due notice, or that he actually appeared. In the absence of evidence, either impeaching a foreign judgment or going to show that it had not, under the laws of the State where it was rendered, the effect of a final judgment, our Courts are bound to consider it as having the force of the thing adjudged. *Hockaday* v. *Skeggs*, 681.

JUDGES AND JURORS.

A Judge of the lower Court has only authority to enforce the judgments of this Court. He cannot interpret our decision, and enforce different decrees than those rendered by it.

The State on the Relation of Boye et als. 102.

Where a party prays for a trial by jury, in an ordinary action, before the case is set for trial, it must be granted.

Simpson v. *Richardson*, 121.

A suit of a succession being a probate proceeding, cannot be submitted to a jury. *Devall* v. *The Succession of Watterston*, 136.

LETTING AND HIRING.

A verbal contract of lease may be proved by parol.

McDonald v. *Stewart*, 90.

An agreement in a contract of lease for the tenant to put improvements on the ground let, so that he may use the ground to advantage, is as much a part of the contract of lease, as would be an agreement therein for him to till the soil. Improvements so made on the personal property of the tenant, and any agreement relative to them, may be proved by parol. *Ib.*

When parties enter into a contract, the contract is to be regulated by the laws in force at the time, and not by laws subsequently made;

LETTING AND HIRING, *(Continued.)*

though the Legislature may pass laws subsequent to the contract, directing the manner in which the rights of the parties thereto may be secured and enforced. It may extend or restrict the remedy, but it cannot exclude *all* remedy. *Ib.*

Under the general issue defendant can prove that his lessor gave him permission to remove from the premises before the expiration of the time stated in the contract of lease, and rent will only be allowed up to that period. *Friedlander* v. *Cushing*, 124.

Where there is a special allegation of a tacit reconduction of a lease in the petition, and it is not traversed, it will be taken as true.

Barnett et al v. *Cate & Co.* 160.

Silence and inaction are, under some circumstances, the means of showing an assent that creates an obligation; if, after the termination of a lease, the lessee continue in possession, and the lessor be inactive and silent, a complete mutual obligation for continuing the lease is created by the act of occupancy of the tenant on the one side, and the inaction and silence of the lessor on the other.

Classen & Co. v. *Carroll et al.* 267.

The parties must abide by the agreement as fixed at the time of the lease. If no time for its duration has been agreed on, the party desiring to put an end to it must give notice in writing to the other, at least fifteen days before the expiration of the month, which has begun to run. *Ib.*

If the tenant, either of a house or of a room, should continue in possession for a week after his lease has expired, without any opposition being made thereto by the lessor, the lease shall be presumed to have been continued, and he cannot be compelled to deliver up the house or room, without having received the legal notice or warning directed by Article 2656 of the Civil Code. *Ib.*

The Civil Code provides that the lessor, and not the lessee (unless there be a stipulation to the contrary), must bear all the real charges with which the thing leased is burdened. He must pay taxes, rents and other dues imposed on the thing leased.

Connell v. *The Female Orphan Asylum et al.* 513.

A. was employed as overseer on a plantation, at the rate of one thousand dollars per year, and while engaged in his duties was conscripted by the Confederate military authorities. The owner of the plantation, by his influence, and by the payment of money and provisions, secured the release of the conscript from active duty, and had him detailed as overseer on the plantation: *Held:*—That the treaties and arrangements entered into by the Confederate authorities to retain the overseer in his employ, were not binding on the overseer; and the owner of the plantation acquired no right of action and no subrogation against the overseer, which he could set

LETTING AND HIRING, *(Continued.)*

up in defence of an action by the overseer to recover the full amount of wages due him under the contract.

Callehan v. *Stafford, Executor*, 556.

Where a person has hired his services for a fixed period, and he leaves his employer before the expiration of that period, he cannot recover wages for the period which he has served, without showing that he had a just cause of complaint against his employer. *Ib.*

The lessee has the absolute right to remove improvements and additions made by him on the thing let, provided he leaves it in the state in which he received it. *Pecoul* v. *Auge*, 614.

He is not obliged to take for them an equivalent in money; nor is the lessor bound to keep and pay for them. He may do this, when the additions have been made with lime and cement. *Ib.*

Defendants pleaded part payment and prescription of three years, to the demand in a suit against a lessee and surety on a lease, for the rent due: *Held*:—That the defences are inconsistent; that the plea of part payment is an acknowledgment that the debt is due, and interrupted prescription. *Elmore* v. *Robinson et ul.* 651.

The surety on a lease is not discharged by the negligence of the lessor in enforcing the rent; in all cases of negligence or refusal of the creditor to act, the surety's remedy is indicated and pointed out in Article 3026 C. C. *Ib.*

Where the surety on a lease fails to plead discussion, to point out the property of the debtor, and to advance a sufficient sum to have the discussion effected, as required by Articles 3015, 3016 C. C., he becomes absolutely bound in solido for the debt, and has lost all the privileges granted by law to simple sureties. *Ib.*

The lessor of a plantation has no privilege on sugar and molasses manufactured for third parties on the plantation, from cane belonging to such third person, grown on another plantation, and who simply used the sugar-mill on lessee's plantation to manufacture his cane into sugar and molasses. *Lesseps* v. *Ritcher et al.* 653.

Where property of a third person is seized by virtue of a writ of provisional seizure, and at the time of seizure is confused with property belonging to defendant, and the entire property is sold, and the money paid into Court to await the result of litigation, the third party having no opportunity to effect a separation of his property: *Held*:—That the party so having his property sold, without authority of law, is entitled to recover from the proceeds in Court the amount which his property is established to have been worth. *Ib.*

Where, by the terms and conditions of a lease, the lessee covenants to allow no goods to be placed on the premises, which, if on the premises, would cause a forfeiture of the insurance, it is a sufficient

LETTING AND HIRING, *(Continued.)*

cause for annulling the lease, if such goods are allowed on the premises with the consent of the lessee.

Mrs. McNeil v. *Dr. Knapp et al.* 701.

Default is not a necessary prerequisite to the rescission of a contract, when the party sued for its rescission has made an actual breach thereof. *Ib.*

A landlord, by virtue of a provisional seizure in a proceeding to enforce the payment of rent due, seized property on the premises belonging to an absent sub-lessee who was not indebted to the lessee for rent, and caused the property seized to be sold on final process: *Held:*—That the property of the under-tenant was illegally seized and sold, and that he could recover of the landlord the value of the property so sold. *Kittridge & Co.* v. *Ribas*, 718.

MANDAMUS.

The law regards the application for a mandamus as summary in its nature, and the answer in opposition thereto should contain a full written defence, whether it involves exception or merits.

Shaw v. *Howell et al.* 195.

MARRIAGE AND MARRIED WOMEN.

Every marriage contracted in this State, superinduces of right, partnership or community of acquets or gains, if there be no stipulation to the contrary. *Lacroix* v. *Derbigny*, 27.

All property hereafter acquired in this State by non-resident married persons, whether the title thereto be in the name of either the husband or wife, or in their joint names, shall be subject to the same provisions of law which now regulates the community of acquets and gains between citizens of this State. *Ib.*

Husband and wife are prohibited from contracting with each other except for certain specified purposes. *Ib.*

MINORS.

Where a tutor makes a promissory note, the consideration of which is the board and tuition of the minor, and he is removed from the tutorship, and is not credited with the amount of the note in his settlement of his account with the minor, or the tutor which succeeds him, the payee of the note cannot recover of the maker if he had knowledge of the consideration—it is a charge on the estate of the minor. *Ford* v. *Miller*, 571.

A judgment homologating an account between a tutor and his ward, and decreeing a balance in favor of the ward, is an executory judgment, and authorizes the issue of an execution to enforce it.

Tunneret v. *Edwards, Sheriff, et al.* 606.

An action was instituted against the administratrix of a deceased person who, during his lifetime had been the tutor of minor children, to make the succession liable for board of the minors: *Held:*—That the debt was not the debt of the tutor, but the debt of the minors;

MINORS, *(Continued.)*

that the action should have been brought against the tutor, and if no new tutor had been appointed, the plaintiff should have asked for the appointment of a tutor ad hoc to represent the minors in his suit. *Normand* v. *Barbin, Administratrix*, 609.

MORTGAGES.

The mortgage is accessory to a principal obligation, which it is designed to strengthen, and of which it is to secure the execution.

Succession of Norton, 36.

Consequently, it is essentially necessary to the existence of a mortgage, that there shall be a principal debt to serve as a foundation for it. *Ib.*

Hence it happens, that, in all cases where the principal debt is extinguished, the mortgage disappears with it. *Ib.*

Hence, also, it happens that, when the principal obligation is void, the mortgage is likewise so; this, however, is to be understood with certain restrictions, which are established hereafter. *Ib.*

A mortgage creditor, next in rank to one who has been paid, is entitled to a judgment against the purchaser, as a third possessor of the property, subject to his mortgage, to be paid out of the funds which he should have retained for that purpose, and which it was incompetent for the sheriff in his official capacity to receive.

Quertier & Co. v. *The Succession of Hille et al.* 65.

A mortgage debtor may legally renounce the benefit of appraisement in the proceedings to sell on executory process, and will not be afterwards allowed to attack the sale as invalid.

Mrs. Broadwell v. *Rodrigues*, 68.

Where a mortgage is given which, by its tenor, shows a difference in a counter-letter given at the same time, it is an act of prohibited and illegal simulation. A partial simulation involves the absolute nullity of an entire transaction, although portions of it be real.

Collins v. *His Creditors*, 235.

A mortgage may be given for a debt not yet in existence; or for a debt which might not be realized but in part; or even a sale might be made as security for money advanced, or to be advanced. *Ib.*

A mortgage is in its nature indivisible, and prevails over every part of the immovable subjected to it; and the mortgaged premises must be sold to satisfy the whole debt, and not a part thereof.

Branner et al. v. *Hardy, Sheriff, et al.* 537.

Where a seizing creditor only sues for such installments of a debt, secured by mortgages, as are due, the property mortgaged must be sold for the whole debt, on such terms of credit as are granted by the original mortgage. *Ib.*

The purchaser of mortgaged property at sheriff's sale is personally bound for the surplus of the adjudication, and holds the surplus

MORTGAGES, *(Continued.)*

subject to the claim of inferior mortgage creditors, who have for their security a special mortgage of the property sold. *Ib.*

Where the immovable property of a railroad corporation is sold, at the instance and suit of the owner of a mortgage bond of the corporation, the interest coupons of which are due, the purchaser at sheriff's sale must apply the surplus to the payment pro rata of all the matured interest coupons of other bonds of the same grade as the one upon which the seizure and sale was made, which are presented and demanded; if he refuses, it is the duty of the sheriff to re-offer the property for sale the same day. *Ib.*

An appellee in the Supreme Court cannot have the judgment altered in his favor, unless he files an answer asking such alteration, within the time prescribed by law. *Conery v. Holmes, Recorder*, 641.

Where several mortgagees sued the purchasers of mortgaged premises, under an order of sale issued on a prior mortgage, to recover the balance over the amount required to satisfy the amount of the mortgage on which the sale was made: *Held:*—That the judgment of the District Court, ordering the money to be paid to the holder of the mortgage next to the first mortgage was correct. *Ib.*

A debtor can arrest the executory process of his creditor, whose act of mortgage contains the non-alienation clause, by surrendering his property to his creditors, when the executory proceedings must be cumulated with the proceedings in insolvency.

Wheeler v. *Stewart*, 673.

A party gave four notes payable to his own order, and by him endorsed in blank, and gave a mortgage on certain immovable property to secure their payment; at the maturity he gave four other notes, to represent the old ones, with the express understanding that the new notes should not in any manner operate as a novation of the old notes, or impair the validity of the mortgage by which they were secured. The mortgage contained a stipulation that, in case suit was instituted on the old notes, the holder should receive interest and attorney's fees. A holder of one of the new notes instituted a suit to recover the amount, with interest and attorney's fees, and also asked for the recognition of the mortgage in his favor, and the enforcement thereof: *Held:*—That the mortgage to secure the payment of the old notes was not to be affected in any manner by the new notes; and that there was no contract of mortgage made to secure the new notes, and the plaintiff could not recover attorney's fees under the stipulation in the mortgage.

The Citizens' Bank of Louisiana v. *Bailey*, 697.

NEW ORLEANS.

Where the city attorney of New Orleans obtained judgment against delinquent tax payers, for taxes, and before the judgments were

NEW ORLEANS, *(Continued.)*

paid and satisfied was removed from office, and his successor claimed for the city the per centage allowed the city attorney for the collection of taxes: *Held:*—That the city attorney who obtained the judgments is entitled to the five per cent. on the amount collected on said judgments, and his successor in office has no authority to interfere and enjoin the sheriff from paying the per centage to the attorney who obtained the judgments.

Bright v. *Hewes et al.* 666.

That the five per cent. allowed the city attorney for collecting city taxes is not the property of the city. *Ib.*

Proceedings were taken to pave a street in New Orleans; a majority of the property owners, by a petition to the Common Council, duly signed in due time, opposed the improvement of the street; subsequently, the majority opposing the improvement of the street withdrew their opposition, and the Common Council proceeded to pass the requisite resolution authorizing the sale and adjudication of the contract to pave: *Held:*—That the proceedings were regular, and property owners on the street liable to pay for the paving, as provided by law. *City of N. O.* v. *Stewart*, 710.

The fact that the taxing power is a party to the contract of lease, does not impair the right to tax the business pursued, by virtue of that contract. The corporation, in each capacity, is acting for the public advantage. *City of N. O.* v. *Crappell*, 725.

OBLIGATIONS.

Where, during the late civil war, the military authorities seized a lot of lumber, and turned the same over to the surveyor of the city of New Orleans, who used the same for repairing the wharves: *Held:* That the party from whom the lumber was seized, can recover the value thereof from the city of New Orleans, it appearing that the seizure in the first instance was without authority of law.

Sherman v. *The City of N. O.* 660.

Where the loss of a flatboat, loaded with coal, at the flatboat landing in New Orleans, is shown to have been the result of carelessness or inexperience on the part of the owner, or by reason of the want of proper crew, or want of skill on the part of the crew, neither the harbor master or the city of New Orleans are responsible for the loss. *Smith* v. *Ivey*, 669.

NOTARIES.

When a person appointed a notary public for the parish of Orleans, ceases to be such, the law (see statute 1857, p. 85, § 3) makes it the duty of the Governor to designate, by order, under the seal of the State, the notary to whose custody the records of the former notary shall be consigned, and Courts are bound to presume when a notary of the parish of Orleans certifies that he has in his custody the record of a former notary of the parish, that the Governor

NOTARIES, *(Continued.)*

has properly discharged his official duty, and has designated him, the notary, as the custodian thereof. *Ledoux* v. *Jamieson*, 130.

The securities of a notary public are only liable on his failure to discharge the duties of his office.

Lescouzeve et al. v. *Ducatel et als.* 470.

The law has not made it the official duty of a notary to receive money to erase mortgages. *Ib.*

OFFENCES AND QUASI-OFFENCES.

In the assessment of damages, in cases of offences, quasi-offences and quasi-contracts, much discretion must be left to the Court or jury.

Rayne v. *Taylor*, 26.

PARTITION.

Where a person acts in a representative capacity, he cannot be personally bound, unless he makes a stipulation to that effect.

Widow Bienvenu v. *Vienne*, 113.

The partition of property among heirs, made without compliance with the formalities and requirements of the law, is a nullity.

Wright & Williams v. *Mrs. Cane et al.* 579.

And the effort of one of the heirs to enforce by suit the partition thus informally and illegally made, does not ratify the partition and cure the defect. *Ib.*

PARTNERSHIP.

Where a party defendant denies that he was a member of the partnership which is sued, it is incumbent on the plaintiff to prove it.

Atwater & Co. v. *Colton & Simonds*, 226.

It has been repeatedly held by this Court, that a partner cannot sue his co-partner for sums paid or advanced for the partnership, or funds placed in it, or goods furnished, or profits made, or losses incurred during its continuance until a final settlement, and then only for the balance which may be due. And even in a special partnership, a partner cannot sue his co-partner for a special item; it must be for a general settlement. *Crottes* v. *Frigerio*, 283.

Commercial partnerships are not chartered under the laws of Louisiana; and, consequently, companies which *are* so chartered do not come within that category. *Monaghan* v. *Hall*, 310.

Creditors of such companies can only compel the members of the same to pay the amounts that may be due by them to the companies on shares owned by them. *Ib.*

If parol testimony, offered to prove the charter of a company, be not objected to, it can be received as evidence to establish that fact. *Ib.*

No provision of law can be found requiring the plaintiff in a partition suit to make creditors, who hold mortgages on the property, parties to the proceedings. *Johnson's Executor* v. *Brown*, 330.

PARTNERSHIP, *(Continued.)*

The agent of a partnership is not an agent of the partners individually. *Ib.*

Where a claim to a right in movable property, apparently belonging to a succession, is set up on the ground of an alleged partnership with the deceased, the proof of partnership must be clear and explicit. *Sutton, Tutor,* v. *Mock,* 597.

Persons are often held partners, as to third persons, when, either expressly or by just implication, they are not to be deemed partners between themselves. *Grieff & Byrnes* v. *Boudousquie & Fortier,* 631.

If one lends his name as a partner, or suffers his name to be used in the business, he is responsible to third persons as a partner, for he may induce third persons to give that credit to the firm or establishment which otherwise it would not receive, nor, perhaps, deserve. This doctrine is founded in the enlarged principles of natural law and justice. *Ib.*

PAYMENT.

Payment of a debt can be proved by one witness. *Mitchell* v. *Simonds, Curator, etc.* 120.

Where a payment was received under duress, the plaintiff must prove that he offered to return the identical notes in which the payment was made. *Emerson* v. *Lee,* 134.

A payment made by a person without interest gives him no subrogation and he is not entitled to an action thereupon. *St. Armand* v. *Alexander,* 243.

He who contends that he is exonerated, must prove the payment, or the fact which has produced the extinction of the obligation. *Ib.*

PLEADING.

Where proof of a reconventional demand has not been heard in the Court below, the judgment should be one of nonsuit and not final. *McClendon* v. *Bennett & Addison,* 49.

Where a party prays for a trial by jury, in an ordinary action, before the case is set for trial, it must be granted. *Simpson* v. *Richardson,* 121.

A party receiving an account, and making no objection to it within a reasonable time, admits its correctness, and cannot afterwards legally object to it. *Mansell* v. *Payne,* 124.

Where there is a special allegation of a tacit reconduction of a lease in the petition, and it is not traversed, it will be taken as true. *Barnett et al. Executor,* v. *Cate & Co.* 160.

The object of pleading is to notify the adverse party of the nature of the claim or defence, that he may be prepared to rebut it, and not be surprised. It is only where, from the pleadings or proceedings before the trial, the opposite party has sufficient notice of the na-

PLEADING, *(Continued.)*

ture of the demand or defence to be advanced, and could not be surprised, that evidence is admissible, although the allegations be indefinite and informal. *Sherman* v. *The City of N. O.* 660.

A party must be informed by the pleadings of the intended attack to be made on his title, that he may be prepared for his defence. *Ib.*

Where a defendant resists the right of the plaintiff to recover the value of property, on the ground that the title of the property in contest is in a third person, the defence must be specially set up in the answer. Evidence going to establish such a defence cannot be given under a general denial. *Ib.*

A rule was taken to set aside an attachment for the reason that no United States internal revenue stamp had been affixed to the affidavit or petition. The rule was dismissed. The defendants afterwards filed a peremptory exception on the general ground that the provision of the United States internal revenue law had not been complied with: *Held*:—That the dismissal of the rule judicially established the fact, that the law requiring a stamp had been complied with, and if any other provision of the revenue law was relied on by the defendant, he should have specially set forth the non-compliance. *Hoyt* v. *Benner et al.* 691.

Fraud must be specially pleaded. *Ib.*

Where a party is called in warranty, and becomes the real defendant in the case, he has the right to make all defences that go to defeat the plaintiff's demand. *Woolfolk* v. *Ship Graham's Polly et al.* 693.

Where the plaintiff resides out of the State, the defendant can institute a demand, in reconvention, against him for *any cause*. *Ib.*

PLEDGE.

A pledgee of a promissory note to secure a certain sum on it, cannot deprive the maker of all equitable defence against the payee, who is still a part owner thereof. *Lacroix* v. *Derbigny*, 27.

Where a party takes a note for bonds or moneys, from one who had embezzled them, and which note went to judgment, they have no right against a third person who received such securities and money in pledge. They thereby ratified the pledge, especially when they used part of the money without knowing from whom obtained. *Warneken & Co.* v. *Marchand*, 147.

PRACTICE.

We think it competent for parties to waive rights and forms, when not prohibited by law. *Quertier & Co.* v. *The Succession of Hills et al.* 65.

Where the plaintiff makes out a prima facie case, which is not impugned by the defendant, the judgment of the Court a quo in his favor will not be disturbed. *Fallon* v. *Maury*, 96.

PRACTICE, *(Continued.)*

Where the proper parties have not been cited the case will be remanded. *Ellery et als.* v. *Dameron et als.* 109.

The right of plaintiff to execute the judgment which he has obtained for a sum of money, can only be suspended upon a petition, affidavit and bond given for an injunction. *The State* v. *The Judge of the Fourth D. C. of N. O.* 110.

A party seeking to recover a claim must make his case certain. *Kearney & Co.* v. *Hauche*, 116.

Under the general issue defendant can prove that his lessor gave him permission to remove from the premises before the expiration of the time stated in the contract of lease, and rent will only be allowed up to that period. *Friedlander* v. *Cushing*, 124.

Where parties are sued jointly no judgment can be rendered against one without the other, although there was issue and trial as to one only. The proceeding is irregular. *Beale* v. *Trudeau et al.* 129.

A suit of succession being a probate proceeding, cannot be submitted to a jury. *Devall* v. *Succession of Watterston*, 136.

A party will not be permitted to deny what he has solemnly acknowledged in a judicial proceeding. *Ib.*

A party cannot shift his position at will to a contradictory one, in relation to the subject-matter of litigation, in order to frustrate and defeat the action of the law upon it. *Ib.*

A party must show cause by rule why evidence taken in limine should not be read in Court. His opponent must answer the rule, or else he waives his objections. *Swift & Co.* v. *Armstrong*, 189.

It is a confounding of terms to call a motion to dismiss an answer to the appeal; and to allow it to be so considered would, in that respect, overturn the rules of pleading. The effect of dismissing an appeal will not, in all cases, be the final confirmation of the judgment appealed from, as the appellant may, under certain circumstances, be permitted to take another appeal. *Johnson* v. *Jennison*, 190.

Where a party goes to trial in the Court below, without a hearing on the exceptions, they are considered as waived, and cannot be heard in this Court. *Cure, Tutrix*, v. *Jean Porte et al.* 206.

The law vests in the Judges of the District Courts great discretion in granting or refusing continuances, and this Court will presume that the discretion, when exercised, is done so legally, and not arbitrarily. *Ryan* v. *Sewell*, 220.

Where a party defendant denies that he was a member of the partnership which is sued, it is incumbent on the plaintiff to prove it. *Atwater & Co.* v. *Colton & Simonds*, 226.

When a cause is called, the party who has not been able to procure the necessary evidence shall be entitled to a continuance, on proving

PRACTICE, *(Continued.)*

either that he has not sufficient time to get his proof, or has been prevented from doing so by some unforeseen cause.

Montgomery v. *The Citizens Mutual Ins. Co.* 227.

The plea of payment requires proof of the fact from the defendant. The onus probandi lies upon him.

Irwin, Executor, v. *Gernon,* 228.

A party purchasing property of various kinds in block, should make due proof of that portion which proved to be deficient, by reason of redhibitory vices, and its relative value.

Walker v. *Cucullu,* 246.

Where no attention has been called to the bills of exception filed, they will be considered as waived, when the case comes before this Court. *Watterston* v. *Bennett et als.* 250.

When a case has been tried by a jury, a verdict rendered, and judgment given according to that verdict, and the case is not properly a jury case, both the verdict of the jury and the judgment will be set aside, and this Court give a decree according to the facts on record. *Lacroix* v. *Coeler,* 256.

An amount involved being over five hundred dollars, the promise (being one to pay money) must be proven by at least one credible witness and corroborating circumstances. *Trabue* v. *Short & Co.* 257.

Where a suit is brought on an unconditional obligation to pay a specific sum of money, the prayer for a jury by the defendant must be made on oath, to the truth of his allegations in the answer.

Gallot v. *McCluskey et al.* 259.

A judgment by the Court a quo, saying: "When, after hearing pleadings, evidence and counsel, it is ordered," etc., is not a compliance with the requisitions of the Constitution. *Ib.*

All the parties in interest must be parties to the suit, and all the partners must sue to enforce a partnership claim. *Ib.*

A Court does not err in refusing a continuance to obtain the testimony of a co-defendant, when he is interested by being bound in solido. *Ib.*

The notification of the filing of a tableau operates as a citation to all persons concerned therein (creditors as well as legatees); and the homologation of an account and tableau bars all further inquiries as to all matters included in the account.

Succession of DeEgana, 263.

Reasons upon which judgments are founded should, whenever it is practicable, be in writing. *Beard* v. *Simon et al.* 270.

Fraud must be alleged and strictly proved, as also partnership. *Ib.*

When an instrument or obligation is annexed to a petition and made part thereof, it is an ample notice of the cause of action.

Johnson v. *Gennison,* 273.

PRACTICE, *(Continued.)*

Per Curiæ:—We do not think it is against good conscience to maintain a judgment rendered against a party who will neither give his personal attention to a suit wherein the judgment was rendered, nor employ another to represent him.

Millaudan v. *Mrs. Gordon et al.* 280.

A continuance cannot be granted on account of the absence of the defendant or the inability of the counsel to attend in Court.

Kohn v. *Short*, 291.

Courts may, at the request of one of the parties, decree that the other party bring into Court the books, papers, and other documents, which are in his possession, and which are material in the cause, provided the party requesting their production declares, in writing and on oath, what are the facts he intends to establish by such books, papers or other documents; and, on the refusal of the party thus called upon to comply with the order of the Court, the facts stated and sworn to shall be considered as having been confessed, unless satisfactory evidence be shown of the impossibility of producing such documents. *Butler* v. *Murison & Co.* 296.

When a party or a third person has been ordered to produce some books, deeds or other documents, he must deliver them previous to or on the day fixed for the trial, to the clerk of the Court, who shall receipt for them, have charge of them, and return them again to the party to whom they belong, after the cause shall have been decided. *Ib.*

If one of the parties wish to obtain books, papers or other documents in the possession of the adverse party, the Court shall order, on motion of the party applying for the same, that such books, papers or documents be brought into Court, and produced on the day fixed for the trial of the cause. The order must describe such books, papers or documents. *Ib.*

This is directory, and in the sound discretion of the Court, according to circumstances. *Ib.*

The right given by law to a litigant, to draw testimony from the books of his adversary, must receive a reasonable construction, and may be fully enjoyed without resort to means which would operate seriously to the detriment of commerce. *Ib.*

When a party to the cause lives out of the Parish where the Court is held, we cannot recognize the right of his adversary to compel him to bring all his commercial books from his domicile to the seat of justice, where the litigation is pending. *Ib.*

Liability for costs should only be paid when justly incurred. An error on the part of the Court a quo will be corrected.

Mrs. Simpson v. *Richardson*, 303.

Great latitude is allowed in introducing evidence under the plea of the general issue. *O'Dowd* v. *Boyle*, 303.

PRACTICE, *(Continued.)*

A verdict in the Court below will be set aside when contrary to law, in civil cases. *U. S.* v. *Murdock*, 305.

The execution of a judgment can be enjoined by no other Court than that from which the writ issued.

Widow Dufossat v. *Berens et al.* 339.

District and Parish Courts have no jurisdiction when actions are brought against persons residing in the State, out of the limit of their respective jurisdiction, except in the cases expressed in the Code of Practice, unless the defendant, of his own accord, should submit to their jurisdiction. *Ib.*

A judgment by default must first be taken, in all cases, before a final judgment can be obtained.

Huntington v. *Crescent City Bank*, 350.

Where, upon the trial below, plaintiff offered as a witness the notary who protested the notes, to prove the facts connected with the tender of the collateral bonds, the defendant objected that the law required the notary, at the time of making protest of the notes, to state therein all the facts connected with the presentment for payment, and that the notary could not testify to anything going beyond the protest, to modify or enlarge the same: *Held*:—That the notary was properly received to prove the facts as regarded the tender of the said bonds, notwithstanding nothing was said about it in the protest, or any statement made by the notary at the time, was a part of the res gestæ in connection with the tender.

Butler v. *Murison & Co.* 363.

The Act of March 10th, 1866, authorizing suits for the ejectment of tenants to be tried by preference, cannot operate retrospectively; and, of course, does not apply to appeals filed previous to its passage. *Hoa* v. *Lefranc*, 393.

Whatever relates to the manner of conducting and trying a suit (litis ordinatio) is always within the control of the Legislature, who can, at any time, make any change or modification they may think conducive to the public good and a proper administration of justice in our Courts. *Ib.*

A second rule cannot be entertained, when one to the same purport and effect has been taken, acted upon and decided, unless for a new cause, arising after the first has been decided.

Harlan v. *White & Trufant*, 399.

Where an obligation sued upon is not negotiable, the assignee can acquire no greater rights than the assignor; and any legal defences which the latter can urge, can be urged against his assignee.

Gray v. *Thomas, Griswold & Co.* 412.

This Court will not look for objections out of the bill; and general expressions therein, such as "illegally taken," "the law has not been

PRACTICE, *(Continued.)*

complied with," "it is not the best evidence," "is inadmissible," and the like, are insufficient. The party taking the bill must spread on the face of it everything necessary to enable the appellate Court to say that the Court below erred. *Ib.*

When the main purpose of a suit is to be tried, either party has the right to require the case to be set down on the ordinary docket of suits, and tried in the ordinary way, under such averments as would authorize a judgment, unless the law prescribes that it be tried in a summary manner. *Gernon* v. *Hickey*, 454.

If this Court shall think it not possible to pronounce definitely on the cause, in the state in which it is, either because the parties have failed to adduce the necessary testimony, or because the inferior Court refused to receive it, or otherwise, it may, according to circumstances, remand the cause to the lower Court, with instructions as to the testimony which it shall receive, to the end that it may decide according to law. *Letten* v. *Spearing et als.* 455.

When a defendant comes into Court by way of exceptions, he takes the attitude of a plaintiff in making the necessary allegations, and assumes the onus of proving them.

Lisida Cure, Tutrix, v. *Porte et al.* 456.

When a party proceeds to trial on the merits, without a decision on the exceptions filed, the latter are considered as waived. *Ib.*

An exception that plaintiff is absolutely without right to stand in judgment, or without interest in the subject matter of suit, may be pleaded at any stage of the proceedings. *Ib.*

An action can only be brought by one having a real and actual interest which he pursues, but as soon as that interest arises he may bring his action. *Ib.*

Code of Practice, Article 401, authorizes a third opponent possessed of a privilege to proceed against the plaintiff and sheriff, without requiring that the opponent should first obtain judgment against the defendant, and without requiring the defendant to be made a party to the opposition. *Wagner* v. *Newman et al.* 508.

Community property is liable for community debts; the estates of minor heirs are merely residuary. *Succession of Kerley*, 583.

The validity, as well as the rank of debts, may be contested in the Court of the concurso. On the arena of the tableau all the creditors are plaintiffs and defendants, and it is there that their respective claims are to be contradictorily settled. *Ib.*

The setting aside of a continuance in a suit, without notice to the adverse party, is irregular, and the judgment will be reversed.

Ogden v. *Wilson*, 596.

A judgment of default, taken while exceptions are filed and undetermined, is a nullity. *Francis* v. *Steamer Black Hawk et als.* 629.

PRESCRIPTION.

Prescription is not interrupted by any process served upon a person in his official capacity, before his appointment to office.

Succession of Virgin, 42.

Where the plea of prescription has not been suggested in the brief, it will be considered as abandoned. *Johns et al.* v. *Race*, 105.

The action of nullity, or rescission of contracts, testaments or other acts, is prescribed by five years; and as prescription raises the presumption juris et de jure, that the donation was duly accepted, the property of the object given is transferred to the donee, without the necessity of any other delivery. Quem de evictione, tenet actio, cum dem agentem repellit exceptio.

Widow Barnabe v. *Mrs. Sauer et ux.* 148.

Without some authentic evidence of the interruption of prescription, no action via executiva can lay. *Perroux* v. *Lacoste*, 726.

The right to make a demand available by exception does not relieve it from prescription in a direct action.

Broussard v. *Marie Broussard*, 593.

If a party, having the right to proceed by exception or direct action, selects the latter mode of proceeding, he must submit to the rules governing direct actions—one rule of which is, that actions may be defeated by prescription. *Ib.*

When the law is changed after prescription begins, the time elapsed before the change is to be computed according to the old law, and that which follows according to the new.

Whitworth v. *Ferguson*, 602.

In the absence of any proof of the lex loci contractus, the provisions of the Code of Louisiana must govern. *Ib.*

Tender of payment by defendant debars him from pleading prescription. A tender is an admission of the debt. *Ib.*

PRINCIPAL AND AGENT.

The principal ought to reimburse the expenses and charges which the agent has incurred in the execution of the mandate, and pay his commission where one has been stipulated.

Clarke v. *Puig Brothers*, 342.

If there be no fault imputable to the agent, the principal cannot dispense with this reimbursement and payment, even if the affair has not succeeded; nor can he reduce the amount of reimbursement, under pretence that the charges and expenses ought to have been less. *Ib.*

A principal is bound by the acts of his agent, made with third persons, after the revocation of the agent's power, unless it appear that the parties with whom the agent deals had notice of the revocation of the agent's authority and were not acting in good faith.

George v. *Sandel*, 535.

PRINCIPAL AND AGENT, *(Continued.)*

A ratification by the principal, of a contract made by his agent, not authorized to make such contract, binds the principal as fully as if the agent had been empowered to make the contract.

Overby v. *Overby, Adm'r*, 546.

PRINCIPAL AND SURETY.

Where a bond has been forfeited on account of the non-appearance of the prisoner, a subsequent arrest and release on bond does not absolve his first surety until his final trial.

The State v. *Defesse, and Benoit, surety*, 104.

PRIVILEGE.

Every mechanic, workman, or other person, doing or performing any work towards the erection, construction or finishing of any building in this State, erected under a contract between the owner and builder, or other person, whether such work shall be performed as journeyman, laborer, cartman, sub-contractor or otherwise, shall have a privilege upon the building. *Mulligan* v. *Mulligan*, 20.

The vendor of an immovable must cause the act of sale to be duly recorded, in order to preserve his privilege; if not so recorded within six days from its date, if passed in the place where the registry of mortgages is kept, adding one day for every two leagues from the place where it was passed to that where the register's office is kept, it has no effect as a privilege; i. e. it confers no preference over creditors who have acquired a mortgage in the meantime, which they have recorded before it; but it will still avail as a mortgage, and be good against third persons from the time of its being recorded. *Succession of O'Laughlin*, 142.

With the exception of special privileges, which exist on immovables in favor of the vendor, of workmen and furnishers of materials, as declared above, the debts privileged on the movables and immovables generally, ought to be paid, if the movables are insufficient, out of the product of the immovables belonging to the debtor, in preference to all other privileged and mortgaged creditors. *Ib.*

The loss which may then result from their payment must be borne by the creditor whose mortgage is least ancient, and so in succession, ascending according to the order of the mortgages, or by pro rata contributions, where two or more of the mortgages have the same date. *Ib.*

When the debts privileged on the movables and immovables cannot be paid entirely, either because the movable effects are of small value, or subject to special privileges which claim a preference, or because the movables and immovables together do not suffice, the deficiency must not be borne proportionally among the debtors, but the debts must be paid according to the order established above, and the loss must fall on those which are of inferior dignity. *Ib.*

PRIVILEGE, *(Continued.)*

Persons having privileged claims on a steamboat or other property, under the allegation that it is all the property the debtor has from which to satisfy his debts, have the right to require the proceeds of sale brought into Court to be distributed among all the creditors, according to their respective privileges.

Lewis, Snapp & Co. v. *Thatcher & Co.* 575.

PUBLIC LANDS.

The Congress of the United States, by the Act passed 29th August, 1842, declared all the entries of lands made in the Greensburg Land District to be null, on account of the errors and imperfections of the public surveys, or of conflicting claims, and authorized the return of the purchase money, on returning the certificates, and ordered a re-survey of the District; and that, when the re-survey should be confirmed, the public lands (unreserved) therein specified shall be subject to the laws for the disposal of the public lands, with this proviso: Provided, that purchasers aforesaid may retain their certificates of purchase, and the surveys of said tracts shall be corrected; and when said surveys are corrected, may receive their patents from the United States for the lands so purchased by them. *Watterston* v. *Bennett et als.* 250.

PUBLIC OFFICERS.

Section 130 of the charter of New Orleans provides, that the right of any officer of the corporation to hold the office he fills may be tested at any time, by quo warranto, on the relation of any citizen.

State v. *Gastinel*, 517.

The inquiry of the Court is not confined to the right of an officer, sought to be ousted, to enter upon an office, nor to the regularity of the means by which he obtained the office, but will test and determine his right to fill the office which he holds. *Ib.*

PUBLIC USE.

Long silence of parties pretending ownership of property converted to public use, and the peaceable and uninterrupted use and possession by the public, is evidence of dedication of the property to the public for public use. *Pickett et al.* v. *Brown et al.* 560.

No deed or act of conveyance is necessary to dedicate lands or rights in immovable property to the public. *Ib.*

The dedication of property for public uses may be inferred from facts and circumstances, which leave no reasonable doubt upon the mind of the intention of the owner to make such a disposition. *Ib.*

There is no particular form necessary to a dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the purposes intended. *Ib.*

REDHIBITION.

The seller, who knows the vice of the thing he sells, and omits to declare it, besides the restitution of the price and repayment of the expenses, is answerable to the buyer in damages.

Gallin v. *Kendig*, 118.

In this case the action for redhibition may be commenced at any time, provided a year has not elapsed since the discovery of the vice.

Ib.

This discovery is not to be presumed; it must be proved by the seller.

Ib.

Article 2510, of the Civil Code, provides, that if the thing affected with the vices has perished through the badness of its quality, the seller must sustain the loss. *Chapman* v. *Matthews*, 118.

The redhibitory action must be instituted within a year, at farthest, commencing from the date of the sale. *Ib.*

If it (the thing) has perished by a fortuitous event before the purchaser has instituted his redhibitory action, the loss must be borne by him. *Ib.*

The warranty respecting the seller has two objects: the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold, or its redhibitory vices.

Widow Morphy v. *Blanchin*, 133.

Redhibition is called the avoidance of a sale on account of some vice or defect of the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice. *Ib.*

If the thing affected with the vice has perished, through the badness of its quality, the seller must sustain the loss. *Ib.*

A party purchasing property of various kinds in *block*, should make due proof of that portion which proved to be deficient, by reason of redhibitory vices, and its relative value.

Walker v. *Cucullu*, 246.

Where the Court is satisfind, from the evidence, that any of the redhibitory vices existed at the time of the sale, and they became apparent within a short time after the sale, the Court will annul the sale and decree a return of the price paid,

Lynch & Wieman v. *McRee*, 640.

Redhibition is a remedy which the law accords to buyers, and it may be exercised by them in two ways: either by direct action, or by way of defence to an action for the price of the thing sold; but, in either form, the remedy originates, for all practical purposes, with the buyer, and the seller is not bound to anticipate the buyer's resort to it. When this remedy is used in answer to a demand for the price, to avoid a sale, the seller is not required to make any averment to let in his proof, to show that he did not contract the

REDHIBITION, *(Continued.)*

obligation to warrant the thing sold against redhibitory vices; for our law does not require a replication or rejoinder, as all matters set up in an answer are understood to be open to every objection of law and fact, as if these objections were specially pleaded.

Wright & Maury v. *Rogers*, 671.

SALE.

The tradition or delivery is the transferring of the thing sold into the power and possession of the buyer. *Mazoue* v. *Caze et al.* 31.

The tradition or delivery of movable effects takes place either by their real tradition, or by the delivery of the keys of the buildings in which they are kept; or even by the bare consent of the parties, if the things cannot be transported at the time of sale, or if the purchaser had them already in his possession under another title. *Ib.*

The seller is not bound to make a delivery of the thing, if the buyer does not pay the price, and the seller has not granted him any term for the payment. *Ib.*

The seller, who knows the vice of the thing he sells, and omits to declare it, besides the restitution of the price and repayment of the expenses, is answerable to the buyer in damages.

Gatlin v. *Kendig*, 118.

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If the thing affected with the vices has perished, through the badness of its quality, the seller must sustain the loss. *Ib.*

SALE, *(Continued.)*

The sale or transfer of a debt includes everything which is an accessory to the same, as suretyship, privileges and mortgages.
Jeckell v. *Fried*, 192.

The renunciation of warranty, made by the buyer, is not obligatory where there has been fraud on the part of the seller.
Bevans & Co. v. *Farrell*, 232.

The seller who knows the vice of the thing he sells, and omits to declare it, besides the restitution of the price and the repayment of the expenses, is answerable to the buyer in damages. *Ib.*

A vendor is bound to good faith, and must state any defect he knows in the thing sold. The exception is when the article is susceptible of convenient examination, the purchaser is bound to make that examination, and abide by it. *Ib.*

An exception to the ruling of the Judge in rejecting the testimony of witnesses cannot be noticed, unless it states the grounds upon which it was rejected. *Hale* v. *City of New Orleans*, 321.

The sale of a thing belonging to another person is null. It may give rise to damages, when the buyer knew not that the thing belonged to another person. *Ib.*

Though the sale of the property of another be null, yet, the vendor's subsequent acquisition of title vests it at once in the vendee, who cannot, afterwards, sue for a rescission. *Ib.*

The thing claimed as the property of the claimant, cannot be alienated, pending the action, so as to prejudice his right. If judgment be rendered for him, the sale is considered as a sale of another's property, and does not prevent him from being put in possession by virtue of such judgment. *Ib.*

Property claimed by a plaintiff cannot be alienated pending the action, so as to prejudice his rights. If judgment be rendered in his favor, the sale will be considered as the sale of another's property, and will not prevent his being put in possession by virtue of the judgment. *Ib.*

Before the institution of an action for the rescission of a sale, the party seeking relief must offer to place his adversary in the same situation that he was before the act of sale was passed. *Ib.*

The plaintiff, in an action for rescission, must establish the loss of the whole or part of the thing sold; the loss must be certain—it will not suffice if it appears probable. *Ib.*

The loss will be considered as certain, if a perfect outstanding title in a third person is shown to exist. *Ib.*

When the judgment directs one of the parties to deliver an estate to the other, the clerk must issue a writ of possession, by which the sheriff shall be enjoined to put him, in whose favor the judgment was rendered, in possession of the estate and the appurtenances belonging to it, according to the judgment. *Ib.*

SALE, *(Continued.)*

The buyer evicted from property which belonged to another, is entitled to reimbursement for all useful expenses made by him on the premises. *Ib.*

The damages mentioned in the fourth paragraph of Article 2482, do not include counsel fees for bringing the action in which they are sought to be recovered. *Ib.*

A sale of movable property is not complete until there has been a tradition or delivery to the purchaser.

Tanneret v. *Edwards et al.* 606.

Movable property, which has been sold but not delivered, is liable to seizure on an execution issued against the vendor to enforce a judgment against him. *Ib.*

A sale of movable property is not complete without delivery.

Cullom v. *Guillot*, 608.

A purchaser of movable property who purchases in good faith, without notice of a prior sale, and who has secured possession of the property, has a good title as against the first purchaser, who has not possession. An injunction to enjoin the second purchaser from taking possession of a portion of the property, in process of delivery, will be dissolved. *Ib.*

Where a vendee gives a special mortgage to secure the payment of a portion of the purchase price of immovable property, he has the right to enjoin proceedings on an order of seizure and sale, where he has reason to fear that he will be evicted or disquieted in the possession of the land by the claim of a third party, until the danger of eviction shall cease, or until security is given against danger of loss by eviction; but if, after the injunction is obtained, the vendor's title is made perfect, he has no right to suspend payment longer, and the injunction will be dissolved.

Thibodeau v. *Thibodeau et als.* 609.

Where, by the announced terms of a public sale, the purchaser has three days to remove the articles purchased, and the property is destroyed in the possession of the seller, before the expiration of the three days, the loss is the loss of the seller.

Gleason & Clark v. *Sykes*, 627.

The acts and declarations of a vendor shortly before and after a sale, though out of the presence of the vendee, acknowledging and showing its simulation, are admissible against the latter to prove fraud in the vendor; but such evidence is insufficient in itself to establish fraud in the vendee. 2 A. 480. 3 N. S. 22. 2 N. S. 13.

Hoose & Victor v. *Robbins et als.* 648.

Suspicion is thrown on the transactions, but title to real property would be rendered too insecure if such evidence were allowed to invalidate authentic acts of sale, particularly where the record

SALE, *(Continued.)*

shows that better and more direct evidence could be adduced. *Ib.*

A., by authentic act, conveyed to B. certain immovable property; B. gave to A. a counter-letter, in which it was agreed that the property was transferred to B., as security for the payment of two specific debts; A. having the right to pay the debts within a fixed delay, and have the property reconveyed to him, otherwise he lost all right therein: *Held:*—That, although this may not have been a real sale, yet it has a real cause, and cannot be invalidated as a simulated sale. *Bailey & McKie* v. *Chase*, 732.

SALE, JUDICIAL

So long as the sheriff's sale of the property is not set aside by a judgment of the Court in a direct action, he may invoke that title against the seizure of it by the defendants in injunction. *McClendon* v. *Kemp, Sheriff*, 162.

The debtor is entitled to the amount received over and above what is due by him on the judgment at a sheriff's sale on execution; and no stipulation which the sheriff may make with the purchaser shall estop him from claiming it. *Parker, Syndic*, v. *Grelier et als.* 167.

The purchaser of property, at a judicial sale of property belonging to a succession, is not bound to look further back than the order of the Court ordering the sale. If the order is made by a Court of competent jurisdiction, the purchaser is not responsible for the proceedings which preceded the order of sale. *Succession of Hebrard*, 485.

He is not bound to inquire whether the Court was mistaken in the facts, upon which the order of sale is based. *Ib.*

Purchasers at sheriff's sale are bound, as to the terms of payment, by the terms announced by the sheriff at the time of sale. *Backen, Administrator, etc.* v. *Hamilton et al.* 553.

Purchasers at sheriffs' sales, who pay the full price of property struck off to them, should not be thereafter exposed to molestation by parties entitled to a portion of the price. *Salter* v. *Clynch*, 662.

SEIZURE AND SALE.

Where an order of seizure and sale was obtained by an administrator, without evidence that he is the administrator: *Held:*—That the omission to produce such evidence is fatal, and the order will be rescinded. *De Brueys* v. *Freret*, 80.

Where several notes, payable at successive periods, and secured by the same mortgage, have all matured, the holder of the last may obtain an order of seizure without proving that the others have been paid. *Ledoux* v. *Jamieson*, 130.

The only inquiry for the Court, when an order of seizure and sale is appealed from, is, whether the Judge who issued had sufficient evidence before him to authorize his fiat. *Peyroux* v. *Lacoste*, 626.

SEIZURE AND SALE, *(Continued.)*

Without some authentic evidence of the interruption of prescription, no action via executiva can lay. *Ib.*

Courts will notice judicially, without proof, all the military orders issued by the Commanding General whilst New Orleans was held by the United States troops, and which affected the action of, and the proceedings in, the Courts of this State.

Taylor v. *Graham et al.* 656.

A party applying for an order of seizure and sale is not bound to presume that a person, whom he is aware is the general agent of an absent or non-resident defendant, has power to represent such defendant in the defence of a suit against him. The appointment of a curator ad hoc to represent the defendant in such a case, is regular; if the agent has full power, it is his duty to cause himself to be substituted for the curator ad hoc during the progress of the suit. *Ib.*

The law does not require the return of a writ of seizure and sale within seventy days. *Ib.*

Article 745 of the Code of Practice, and the terms therein used—"the same delays and formalities"—have reference to the sale of the property seized, and do not refer, in any manner, to the mode or time in or during which returns of orders of seizure and sale shall be made. *Ib.*

It suffices that the law is silent as to return into Courts of writs of seizure and sale, and that no definite period for the return of the writ in question was therein prescribed. The Court cannot, therefore, say that the tardy action of the sheriff in the execution of the writ, rendered the sale made under it a nullity. *Ib.*

SERVITUDES.

Servitudes are either visible and apparent or non-apparent.

Lallande v. *Wentz & Pochelu*, 289.

Apparent servitudes are such as are to be perceivable by exterior works, such as a door, a window, an aqueduct. *Ib.*

Non-apparent servitudes are such as have no exterior sign of their existence, such, for instance, as the prohibition of building on an estate, or of building above a particular height. *Ib.*

If the inheritance sold be encumbered with servitudes not apparent, without any declaration having been made thereof, if the servitudes be of such importance that there is cause to presume that the buyer would not have contracted if he had been aware of the encumbrance, he may claim the cancelling of the contract, should he not prefer to have an indemnification. *Ib.*

SHERIFF.

To effect the seizure of a negotiable note, *before maturity*, it must be taken into actual custody by the sheriff. *Miller* v. *Streeder*, 56.

In order to make a valid seizure of tangible property, the thing levied

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SHERIFF, *(Continued.)*

upon must be taken into actual possession by the officer. A promissory note, endorsed in blank by the payee, is of that class of property; it is not merely the evidence of debt; with its endorsements, it contains the obligations of several parties, and is the subject of sale and delivery, as much as any other movable. *Ib.*

STATUTES.

A statute must be produced in order to be enforced in a Court of Justice. *Bissell* v. *Terrell et al.* 45.

The word "established," as used in Article 1099 of the Civil Code, has a well known legal signification, and implies that the claim to property, doubtful as between the third person and the succession, is permanently settled and confirmed. *Succession of Weigel*, 49.

SUBMISSION.

A submission is a covenant by which persons who have a lawsuit or difference with one another name arbitrators to decide the matter, and bind themselves reciprocally to perform what shall be arbitrated. *McClendon* v. *Kemp, Sheriff*, 162.

A submission must be reduced to writing. *Ib.*

SUBROGATION.

Subrogation takes place of right: 1. For the benefit of him who, being himself a creditor, pays another creditor, whose claim is preferable to his, by reason of his privileges or mortgages. *Stiewell* v. *Burdell*, 17.

2. For the benefit of the purchaser of any immovable property, who employs the price of his purchase in paying the creditors to whom the hereditament was mortgaged. *Ib.*

3. For the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it. *Ib.*

4. For the benefit of the beneficiary heir, who has paid with his own funds the debts of the succession. *Ib.*

5. The surety is discharged when, by the act of the creditor, the subrogation to his rights, mortgages and privileges, can no longer be operated in favor of the surety. *Ib.*

SUCCESSIONS.

The place in which a succession is opened is, and in future shall be held to be, as follows, notwithstanding any former law to the contrary: In the parish where the deceased resided, if he had a domicile or fixed place of residence in the State; in the parish where he left landed property, if he had neither domicile nor place of residence in the State; or in the parish, in which it appears from the inventory, that his principal property was situated, if he had property in several parishes; in the parish where he died, if he had no certain or any fixed property. C. P. 929. *Armstrong* v. *Bakewell*, 30.

The notification of the filing of a tableau operates as a citation to all

SUCCESSIONS, *(Continued.)*

persons concerned therein (creditors as well as legatees); and the homologation of an account and tableau bars all further inquiries as to all matters included in the account.

Succession of De Egana, 263.

A creditor of a deceased person, who purchases property of the succession of the deceased, cannot compensate his claim against the price which he has agreed to give for the property.

Succession of Mary McGinnis, 268.

A creditor who gets possession of the price for which the property of a succession is sold, has no greater right than a creditor who purchases the property of a succession. *Ib.*

All kinds of fruits, natural, cultivated or civil, produced during the existence of the usufruct, by the things subject to it, with the exception of the children of slaves, belong to the usufructuary.

Ib.

Where accounts are duly presented before the homologation of a tableau, and are not contested, they will be presumed to be correct.

Interdiction of Rochon, 272.

When the property is indivisible by its nature, or when it cannot be conveniently divided, the judge shall order, at the instance of any one of the heirs, on proof of either of these facts, that it be sold at public auction, after the time of notice and advertisements prescribed by law, and in the manner hereinafter prescribed. *Ib.*

It is said that a thing cannot be conveniently divided, when a diminution of its value, or loss or inconvenience of one of the owners, would be the consequence of dividing it. *Keller* v. *Judson*, 282.

A witness can be allowed to testify where he was not a party to the original act. *Westholz, Adm'r*, v. *Retaud*, 285.

Succession is the transmission of the rights and obligations of the deceased to the heirs. *Ib.*

When, at the decease of the testator, there are heirs to whom a certain proportion of the property is reserved by law, these heirs are seized of right, by his death, of all the effects of the succession, and the universal legatee is bound to demand of them the delivery of the effects included in the testament. *Ib.*

The legatees under an universal title are bound to demand the delivery of the heirs, to whom a proportion of the effects is reserved by law; in default of heirs, of the universal legatees, and in default of those, of the next heirs in the order established in the title of successions. *Ib.*

It is a presumption of law, that every species of property found in a person's possession at his death belongs to his succession.

Succession of Alexander, 337.

A tableau of distribution, by its very name, implies a control over the fund to be distributed. *Rochereau et al* v. *Harvey et al.* 391.

SUCCESSIONS, *(Continued.)*

Every marriage in the State superinduces a community of acquets and gains, unless there be a stipulation to the contrary.
Howard v. *Zeyer et al.* 407.

A warrantor is not bound to look beyond the decree of a Court ordering the sale of succession property; and he acquires all the right of the deceased to said property, and no more. *Ib.*

The right which a possessor has, in case of eviction from the thing reclaimed, to retain it, until he is reimbuesed, brings with it the expenses he may have incurred on it. *Ib.*

The rules of Louisiana law, relating to the opening and proving of wills, apply to the preliminary proceedings necessary to the administration of estates, which are not conclusive upon those instituting them or the parties cited or present, so as to estop them from subsequently contesting the validity of a will, unless at the time of probate its validity was expressly put at issue. On the other hand, if at the time of probate the genuineness of the will is denied, the party seeking its execution must produce the kind of evidence necessary to counterbalance the express denial and establish its validity. *Succession of McDonogh*, 419.

The law has fixed the kind and measure of the evidence necessary to the preliminary proof of an olographic will; the testimony of two credible persons, who shall have become familiar with the handwriting of the testator by having seen him often write and sign; not only sign his name, but write other matter besides his name, and who shall attest, solemnly declare that they recognize the testament as being entirely written, dated and signed in the testator's handwriting; it must be acknowledged and proved by them; they must recognize the handwriting of the testator, and declare the whole instrument, date, body and signatnre, to be in his handwriting. C. C. 1648. *Ib.*

All evidence of handwriting, except were the witness saw the document written, is presumptive, and rests upon the principle of comparison, which is made in two ways: by comparing with the exemplar formed in the mind by previous knowledge, or with other writings produced on the occasion, and proven or admitted to be genuine; and at best is merely evidence of opinion, which admits of various degrees, and the weight of which is to be determined by the Court. *Ib.*

If the party, against whom the act under private signature is produced, disavows the signature, or the heirs or other representatives declare that they do not know it, it must be proved by witnesses or comparison, as in other cases. *Ib.*

If the defendant deny the signature or contend that it is counterfeited, the plaintiff must prove the genuineness of such signature, either by witnesses who had seen the defendant sign the act, or who de-

SUCCESSIONS, *(Continued.)*

clare that they know it to be his signature, because they have frequently seen him write and sign his name. But the proof by witnesses shall not exclude the proof by experts, or by a comparison of the writing, as established in the Civil Code. *Ib.*

The principle recognized in the application of this rule of law is, that the express denial of a signature to a private writing, or the charge that it is counterfeited, has some weight, and imposes upon the party seeking to enforce the obligation the burden of counterbalancing its effect by the kind of evidence prescribed. *Ib.*

Judges should receive the truth from the hands of the law and in the form which it has established; but it is equally their duty to be fully satisfied that what is offered in such form is really truth. It comprehends the principle which this Court is constantly applying, that a plaintiff must make his case not merely probable, but legally certain. *Ib.*

Bastards, adulterous or incestuous children, who are prohibited by law from inheriting anything more than mere alimony, cannot take property as legatees. *Bennett* v. *Cane et als.* 590.

Where children are prohibited by law from receiving property as heirs, they cannot receive as legatees by last will. *Ib.*

The law reprobates the begetting of illegitimate children, and only grants to natural children, i. e. those illegitimate children who have been acknowledged by their natural parents, the right to receive from their natural parents by donations mortis causa beyond what is necessary to procure them sustenance, or an occupation or profession. *Ib.* 592.

Where one of the children of a deceased parent furnished necessaries for the support of the deceased, and attended to the wants of the parent during sickness and old age, it furnishes a just charge on the estate of the deceased, and the heirs must contribute to the payment of the charge. *Estate of Marie Olivier*, 594.

Where a claim to a right in movable property, apparently belonging to a succession, is set up on the ground of an alleged partnership with the deceased, the proof of partnership must be clear and explicit. *Sutton, Tutor*, v. *Mock, Adm'r*, 597.

Succession charges, inuring to the benefit of all parties concerned, are of higher dignity than and (unless in an exceptional case) are to be paid before those of the deceased or the insolvent.

Succession of Lauve, 721.

A husband made application to be put in possession of the community property, as survivor and usufructuary of his wife, she having died without leaving heirs, either ascendant or descendant, the Court granted the application, without notice to the attorney for absent heirs: *Held*:—That the application could only be granted after

SUCCESSIONS, *(Continued.)*

due notice to the attorney representing absent heirs, and must be determined contradictorily with the heirs. *Suc. of Fleming*, 726.

A sale of real estate belonging to a succession, without appraisement, is null and void, and the purchaser is not bound to comply with the adjudication. *Succession of Curley*, 728.

The general rule requires succession property to be sold, after advertisement of ten days for movables and thirty days for real estate. *Ib.*

The expression, in the Act of 17th January, 1838, "that the curator so appointed shall cause the effects of said succession to be sold, and the proceeds to be applied to the payment of the debts of the deceased; the whole to be done in as summary a manner as possible, to diminish costs, and under the immediate direction of the Judge;" does not convey any such meaning, nor substitute the will of the officer in lieu of the law passed to protect the creditor and the heirs, and to call as much competition as possible. In as summary a manner as possible, means as possible according to law, speedily and diligently as allowed by law, but not against law. The sale, therefore, was legally impossible, without previous advertisement of thirty days. *Ib.*

TAXES AND TAXATION.

The provision in the charter of the corporation of Bastrop, which limits the power of the corporation to assess taxes on property, only restricts the power to levy taxes on assessable property. and does not restrict or interfere with the right to impose a tax on trades or occupations and licenses, and thereby increase the revenues of the corporation above the amount limited in its charter.

Blanks & Co. v. *The Corporation of Bastrop*, 534.

The subscription notes of a mutual insurance company constitute a part of the capital stock of the company, and are subject to taxation. *City of N. O.* v. *State Mutual Ins. Co.* 675.

That portion of the capital of the Citizens' Mutual Insurance Company which is invested in bonds and stocks exempt from taxation by statute, is subject to taxation as the capital of the corporation.

City of N. O. v. *The Citizens' Mutual Ins. Co.* 707.

For purposes of taxation, there is a distinction between the actual capital of the corporation and the bonds or securities in which that capital is invested; and the city of New Orleans, by the provisions of its charter, can impose a tax on the entire capital of the corporation invested in bonds and securities, irrespective of the character of such bonds or securities. *Ib.*

TUTOR AND MINOR.

Where a person acts in a representative capacity, he cannot be personally bound, unless he makes a stipulation to that effect.

Widow Bienvenu v. *Vienne*, 113.

TUTOR AND MINOR, *(Continued)*

If a tutor should die, or absent himself from the State after his appointment, another tutor shall be appointed in his place by the competent judge; and there is no need of a judgment removing him from the tutorship. *Succession of Rebecca Bookter*, 157.

USUFRUCT.

The usufructuary must give security that he will use, as a prudent administrator would do, the movables and immovables subject to the usufruct, and that he will faithfully fulfil all the obligations imposed on him by law, and by the title under which his usufruct is established. *Westholtz* v. *Retand*, 285.

Courts will not permit an injustice to be done the owner by the usufructuary, in his abandoning arbitrarily that part of the property subject to usufruct, which might be heavily burdened with charges or repairs, or which he might so consider, and retain that which was profitable, unless the law imperatively required Courts to sustain the usufructuary in such a course.

Judice, Widow, etc. v. *Marie V. Provost et al.* 601.

If the usufructuary desires to be relieved from the repairs and charges imposed on him as usufructuary, he must renounce the usufruct on the whole, not on a part, of property subject to right of usufruct. Civil Code, 569. *Ib.*

Plaintiffs have no right to force defendants into a multiplicity of suits, in the division of the property belonging to the community. *Ib.*

WITNESS.

The admissibility of a witness does not depend on the amount of the interest involved; but it is competent for the party offering the witness, if the objector does not pursue the inquiry, to show, on cross-examination, whether or not the witness really has any disqualifying interest in the result of the suit, and for this purpose may inquire how the witness is interested. Further inquiry may show that the interest admitted is not of a disqualifying nature. Some witnesses may feel a strong interest in the success of one of the parties from friendship, relationship, or other motive, which goes to their credibility, or they may be interested in the question; and it is proper that the grounds of their belief, as to their interest, should be developed. *Succession of Weigel*, 49.

A release of one interested in a suit by an attorney of record is not good. Such an act is not within the province of counsel, and he must have special authority to bind his client in such case. *Ib.*

Descendants are expressly prohibited from being witnesses in civil cases for or against their ascendants. This prohibition is not based exclusively upon the reason that these relations are the forced heirs of each other, but because it has hitherto been the policy of the law to withdraw the witness from the necessity of testifying for

WITNESS, *(Continued.)*

or against those to whom he sustains such intimate and delicate relations, and to relieve the Courts from the embarrassment of hearing and deciding upon this kind of proof. *Ib.*

Payment of a debt can be proved by one witness.
Mitchell v. *Simonds*, 120.

A witness can be allowed to testify where he was not a party to the original act. *Westholtz* v. *Retand*, 285.

The competent witness of any covenant or fact, whatever it may be, in civil matters, is that who is above the age of fourteen years complete, of a sound mind, free or enfranchised, and not one of those whom the law deems infamous. *Cull* v. *Herwig et als.* 315.

He must besides be not interested, neither directly or indirectly in the cause. *Ib.*

The husband cannot be a witness either for or against his wife, nor the wife for or against her husband; neither can ascendants with respect to their descendants, nor descendants with respect to their ascendants. *Ib.*

Interrogatories having been propounded, answered and offered, and received in evidence, together with the affirmative answers, without any objection, we are bound to give to them their full effect. *Ib.*

An exception to the ruling of the Judge in rejecting the testimony of witnesses cannot be noticed, unless it states the grounds upon which it was rejected. *Hale* v. *City of New Orleans*, 321.

The criminal law has not determined at what age a witness is competent; that competency depends upon his intelligence, reason, judgment, capacity and understanding, which are all matters of facts left to the discretion of the Judge and jury. As to the dying declaration, this Court, in the case of *State* v. *Bennett*, 14 A. 651, has decided that the mental and physical condition of one, whose dying declarations are offered, is a question of fact over which the Supreme Court has no jurisdiction. *The State* v. *Ross et al.* 340.

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